SUPREME COURT OF THE UNITED STATES.

SAMUEL H. STONE, &c., ... *Appellants,*

vs. **No. 360.**

LOUISVILLE BANKING COMPANY. . . . . *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 361.**

LOUISVILLE BANKING COMPANY, ... *Appellee.*

SAMUEL H. STONE, &c., ... *Appellant,*

vs. **No. 362.**

BANK OF COMMERCE, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 363.**

BANK OF COMMERCE, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 364.**

THIRD NATIONAL BANK, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 365.**

CITIZENS NATIONAL BANK, ... *Appellee.*

THIRD NATIONAL BANK, ... *Appellant,*

vs. **No. 404.**

SAMUEL H. STONE, &c., ... *Appellees.*

CITIZENS NATIONAL BANK, ... *Appellant,*

vs. **No. 405.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIDELITY TRUST & SAFETY VAULT COMPANY, . *Appellant,*

vs. **No. 406.**

CITY OF LOUISVILLE, ... *Appellee.*

FIDELITY TRUST & SAFETY VAULT COMPANY, . *Appellant,*

vs. **No. 407.**

SAMUEL H. STONE, &c., ... *Appellees.*

LOUISVILLE TRUST COMPANY, ... *Appellant,*

vs. **No. 408.**

CITY OF LOUISVILLE, ... *Appellee.*

LOUISVILLE TRUST COMPANY, ... *Appellant,*

vs. **No. 409.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIRST NATIONAL BANK, ... *Appellant,*

vs. **No. 634.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIRST NATIONAL BANK, ... *Appellant,*

vs. **No. 635.**

CITY OF LOUISVILLE, ... *Appellee.*

BRIEF FOR BANKS AND TRUST COMPANIES.

We represent the banks and trust companies above named, being the appellees in the six cases first mentioned in the caption of this brief, and the appellants in the succeeding eight cases; the place of business of these institutions being in Louisville, Ky.

Each of the institutions named filed two bills in the Circuit Court of the United States for the District of Kentucky; in one, the members of the Board of Valuation and Assessment and the City of Louisville are united as defendants; in the other the suit is against the City of Louisville alone.

In the former class of suits an injunction was sought to restrain the Board of Valuation and Assessment sitting at Frankfort, Ky., and composed of the Auditor, Secretary of State and Treasurer from proceeding to assess the property of the several complainants under the alleged authority of the general Revenue Act of the State, approved November 11, 1892, and the Auditor from certifying said assessment to the County Clerk of Jefferson county, and also to restrain the City of Louisville from attempting in any way to cause such assessment to be made or to collect such taxes.

In the latter class of cases an injunction was sought to restrain the City of Louisville from collecting the tax for the years 1893 and 1894 upon assessments which had already been certified by the Auditor, under the authority of the law in question, to the County Clerk of Jefferson county, and by him certified to the City Tax Collector.

In all the bills except those filed by the First National Bank it is alleged that a contract formally entered into under the authority of the act passed in 1886, hereafter called the Hewitt act, was made between the State of Kentucky and each of the complainants, by which the complainants could severally discharge themselves and their shareholders of all taxation against the corporation and its shares of stock, by the payment of seventy-five cents on each share of stock of the par value of $100, and the current rate on the surplus over ten per cent. of the capital, and the local taxes on the building in which it did business; that the contract thus made extended through the corporate existence of the respective complainants; that the contract is inviolable; but that nevertheless the State has, by the act above mentioned, of November 11, 1892, attempted to tax the complainants by a different method, and imposed upon them a much heavier burden of taxation than was imposed under the Hewitt act of 1886. Apt allegations are, in each instance, made as to the amount involved, and of payment or tender of amounts admitted to be due.

It is further alleged that the identical questions now involved were presented in litigation between the City of Louisville and the

complainants (except in the case of the First National Bank), in which the State, by its Attorney-General, participated and opposed the contention of the complainants, and that in June, 1895, the Court of Appeals, the court of final resort in the State, decided the questions in favor of the complainants and adjudged that the contract made under the Hewitt act of 1886 was inviolable, and lasted during the corporate existence of the respective complainants; and this adjudication is pleaded as a bar to the right of the State or city to attempt to assess or collect taxes in the method pointed out by the act of November 11, 1892.

It is alleged that the members of the Board of Valuation and Assessment are threatening to assess, and will, unless restrained, proceed under the authority of the act of November 11, 1892, to assess, all the property of the complainants for the years 1895, 1896 and 1897; and that the Auditor will, unless restrained, certify said assessments to the Clerk of the Jefferson County Court, who will, in turn, certify the same to the City Tax Collector for collection; and that, unless restrained, the city will proceed by its proper officers to distrain or sue for the alleged taxes, and also for the taxes of 1893 and 1894, already certified by the Auditor, and will attempt, by distraint and levy or suit, to collect the same, and thus will cause irreparable injury to the complainants and their stockholders.

Further allegations are made showing that the State, under the authority of the act of November 11, 1892, will attempt to impose a fine of $1,000 against complainants for failing to report, as required by that act, and an additional fine of $50 per day for each day the companies have been in default in making the reports as required by the act.

The national banks, in addition to insisting that their acceptance of the Hewitt act of 1886 constituted a contract with the State, also insist that the act of 1892, which defendants are seeking to enforce as against them, is void as to them because in conflict with the National Banking act.

They also claim that, under the circumstances, hereafter more at large stated, they are entitled to be placed upon a footing as to taxation equally favorable with the most favored State bank doing business in the city of Louisville.

The cases were heard at Nashville, Tenn., before Justice Harlan and Circuit Judges Taft and Lurton on the motion of complainants for a temporary injunction and on the demurrers of the defendants. Temporary injunctions were granted; and afterward the Circuit Court entered final decrees in favor of the Louisville Banking Company and the Bank of Commerce in both of their cases; and in favor of the Third National Bank and the Citizens National Bank in their cases which sought to restrain the collection of the taxes for 1893 and 1894, but the Court dismissed their bills which sought to restrain the assessment of the taxes after the

year 1894; and dismissed both of the bills of the two trust companies. The City of Louisville has appealed in the first six cases, and the different institutions mentioned have appealed in the last eight cases.

The Circuit Court was of opinion that the extension of a National Bank charter under the act of Congress of 1882 did not continue the old corporate existence, but created a new corporate existence, and therefore as the Third National Bank and the Citizens National Bank had availed themselves of this act to extend their charters in the year 1894, the Court held that their contracts with the State under the Hewitt act expired at that time, and they were held liable under the general revenue law of November 11, 1892, for all years after the year 1894.

The court was further of the opinion that the aggregate tax levied upon National Banks was not greater than would be levied if they were taxed upon their shares of capital, and therefore, apparently without inquiring into the question as to whether the tax was in fact a tax upon all the property of the banks according to valuation, the court seems to have rested its opinion wholly upon the idea that the banks did not suffer because another kind of tax on the shares of capital would have made them carry approximately the same burden.

The court was also of the opinion that the trust companies, not being exactly similar institutions to banks, and probably not performing a public service, there was sufficient dissimilarity between such corporations and the corporations actually involved in the litigation to make the contract of the city—on which, as hereafter explained, rests the claim of *res adjudicata*—not enforceable.

FACTS.

From the earliest history of this State down to 1892, it had been the policy of the State to tax all the banking capital of the State according to a uniform rate, and as this could only be done by exempting them from local burdens, the policy was adopted of taxing them somewhat higher for State purposes and exempting them from local taxation.

When the General Assembly came, in 1886, to adopt a general revision of the revenue law, one of the first serious controversies which arose in that body, was upon the method of taxing banks. It was claimed by many of the members that the taxation upon banks was too light, and not just to the remainder of the taxpayers of the State. It was pointed out that they were allowed to discharge themselves of all kinds of tax by the payment of fifty cents on a share of stock equivalent to one hundred dollars, while the remainder of the taxpayers of the State must pay to the State forty-seven cents on the one hundred dollars, and then bear in addition the local burdens of their respective communities. It was

insisted that the banks should be taxed just as every other taxpayer, and be made to bear no more of the State burdens than taxpayers generally, but should be made to bear their full share of all the local taxation. This argument, upon the face of it, seemed fair. But as investigation went further into the subject, it was found that, throughout the whole legislative history of bank taxation in this State, the banks had never been, by a single law, taxed by the political subdivisions of the State. The question which was then debated was whether that policy should be continued or now changed for the first time, and banks be taxed in the future as other taxpayers.

In order to determine this question, the Legislature inquired into the reason for the policy which had existed so long in this State, and, of course, discovered the economic truth, which can not be answered or evaded, that there can be no discrimination in favor of or against capital employed in the banking business, without those most heavily burdened being forced to the wall by the competition of those less heavily burdened.

A bank in Louisville, if it must carry a burden of $2.30 on the $100 (the sum of State and local tax) can not compete with the banks in the surrounding counties, whose total burden is less than a dollar; nor can they compete with the banks of the flourishing cities of New Albany and Jeffersonville, in Indiana, just across the river, which do not carry one half of that burden.

And so the illustration might continue. In no two counties in the State, we venture to say, are the local burdens exactly the same. But it was insisted that, while it might be true that it was not practicable to subject banks to local taxation, because of the difference in the burdens which they must respectively carry, yet there was no reason why they should not all be taxed upon the strictly *ad-valorem* system. It was said: "We are now adopting a law which does not give an individual a right to deduct his debts from his assets. Why, then, should not we tax these banks upon *all their assets*, including bills receivable? Then, we will compel them to carry a larger share of the public burden, and then the tax will be uniform."

But upon further investigation it was found that this could not be done, for precisely the reason applicable to local taxation, as shown by the following consideration:

National Banks, being agencies of the Federal Government, can not be taxed by the States to any extent, unless the Federal Government consents that they may be, and then they can not be taxed beyond the limits of that consent; and no consent has been given to tax their personal assets.

So, then, it was apparent to the Legislature that, to tax by the *ad-valorem* system all the assets of the State banks, would result in the grossest discrimination against them in favor of the National banks, the effect of which would be to drive them out of existence,

or force them to become National banks. To make a long story short, after considering every phase of the question, the Legislature determined that the old policy was the best policy, and so they continued it. But, it was said that the tax burden on the banks was not sufficiently heavy, and that they should be made to pay more than fifty cents on the share, if they were to be exempt from local taxation. It was then determined to retain the method of specific taxation, but to *increase the rate* of taxation. And here again the Legislature was met with this difficulty:

There were three or four banks in the State which had charters granted prior to the act of 1856 (which was the first act adopted in Kentucky reserving the general right to alter, amend or repeal charters). These charters gave them a contract right to discharge themselves of all their tax burdens by the payment of fifty cents on each share of stock. And, again, it was declared by the National banks that they were entitled to be put upon an equally favored footing, in view of the important part which the capital of the old banks, as compared with the total bank capital, played in the State. And it was so decided by the Court of Appeals in the case of City National Bank vs. Paducah, 9 S. W. Rep., 218 (10 Kentucky Law Reporter, 21), on the authority of Covington City National Bank vs. City of Covington, 21 Fed. Rep., 484.

There was a good deal of discussion between the Revenue and Taxation Committees, representing the Legislature, on the one side, and the representatives of the banks on the other. Finally it was agreed, upon the part of the old banks and the National banks, that if the State would put all the banking capital on the same plane and give a contract that it should remain at that rate for the remainder of the corporate existence of the several banks, they would consent to a modification of their rights and to pay taxes to the State, as indicated in the pending bill. This was agreed upon; and the Hewitt act was accordingly adopted.

By this act (article 2), and the agreement thereunder, the banks and other corporations therein named contracted to pay 75 cents on each share of stock equivalent to $100 at par, and the current rate of taxation on the surplus of the bank over 10 per cent. of the capital, and, in addition, to pay local taxes on the buildings in which their business was done. Neither party, however, was willing to trust to the ordinary statutory contract, but preferred that the agreement which had been arrived at should be put in the most formal and definite shape. Accordingly, by the fourth section of the second article, it was declared as follows:

"Sec. 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same, as herein provided,

"and to waive and release all right under the acts of Congress "or under the charters of the State banks to a *different mode or* "*smaller rate* of taxation, which consent or agreement to and "with the State of Kentucky, shall be evidenced by writing, "under the seal of such bank, and delivered to the Governor of "this Commonwealth; and upon such agreement and consent "being delivered, and in consideration thereof, such bank and "its shares of stock shall be exempt from all other taxation "whatsoever so long as said tax shall be paid during the cor- "porate existence of such bank."

In pursuance of this section all of the complainants in existence at that time, except the First National Bank (which seems in some unexplained way to have overlooked the matter), convoked their stockholders in special meeting and laid the proposition of the State before them; and in each instance a majority of the stockholders accepted the proposition of the State, and signified that acceptance in writing, under the seal of the bank or trust company as the case might be, and delivered the same to the Governor, as required by the section quoted. The First National Bank either did not hold this meeting, or else it failed to make a record of it. At any rate, no minute of the meeting can now be found, though, in company with all the other banks and moneyed institutions, it paid taxes under and in accordance with the Hewitt act from the date it took effect.

In 1891 a new Constitution was promulgated in Kentucky. From the passage of the Hewitt act, in 1886, and until 1892, (when the Legislature assembled for the first time after the adoption of the new Constitution), all the banks and trust companies paid taxes under the Hewitt act, by which act, as we have seen, all the banking and moneyed institutions of the State were put upon an exactly equal plane with reference to taxation.

On the 11th of November, 1892, the Legislature passed the present law. So much of that law as bears upon this question, as well as the second article of the Hewitt act (the one relating to taxing institutions of loan or discount) will be found in the Appendix to this Brief.

By the first section of Article 3 of the present revenue law, numbered in the Kentucky Statutes as 4077, it is provided, so far as banks and trust companies are concerned (omitting the names of other corporations), that every incorporated bank and trust company shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are thereby constituted a Board of Valuation and Assessment for fixing the value of said franchises. * * * The Auditor shall be chairman of said Board, and shall convene

the same from time to time as the business of the Board may require.

Section 4078 prescribes the method of ascertaining the value of the franchise, and has been held by the Court of Appeals of Kentucky, and by this Court, to include *all the intangible property of the corporation*, including its franchise proper.

Section 4083 provides for the Auditor sending out notices to the various corporations of the values fixed, and thirty days are given to the corporations after receiving the notice to appear before the Board and seek a reduction of the assessment.

Section 4084 declares that the Auditor shall, at the expiration of thirty days after the final determination of such value, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

Section 4087 declares that "any corporation, or officer thereof, willfully failing or refusing to make reports as required by this chapter, shall be deemed guilty of a misdemeanor, and for each offense shall be fined $1,000, and $50 for each day the same is not made after October 1st of each year."

Section 4090 declares that should any corporation fail to make the reports as required therein, on or before the first day of October of each year, the said Board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

Section 4091 provides that all taxes against any corporation, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to the corporation by the Auditor; and that every such corporation failing to pay its taxes after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the taxes shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; and that any such corporation failing to pay its taxes, penalty and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

By section 4092 it is declared that all banks and trust companies shall file their reports required by section 4078 of this article on or before the first day of March, 1893, and annually on or before

March 1st thereafter. Said reports shall be made up to and including the 31st day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports or to pay said taxes as herein required, said banks and trust companies shall be subject to the same fines and penalties as prescribed in section 4091 of this article. It will be seen that the only difference made between banks and trust companies and other corporations is as to the *date* of report and payment.

After the adoption of this law, the banks and trust companies of the State were called upon to make reports as required by the act. Under the advice of counsel they did this under protest, at the same time claiming that they had a contract with the State to pay as provided by the Hewitt act. When the time came for payment they tendered the amount due by them under and in accordance with the Hewitt act; and, this being refused by the Anditor, they paid under protest the amount *due the State* under the existing revenue law, which was less than the amount due the State under the Hewitt act, the latter being in full of all taxes.

AGREEMENT WITH THE CITY OF LOUISVILLE.

About this time the City of Louisville passed an ordinance levying a tax of four per cent. on the gross receipts of the banks and trust companies, payable to the Sinking Fund of the city. This was intended as a substitute for the *ad-valorem* tax, and was a means of arriving at the taxable values by reference to gross receipts. These institutions denied the power of the city to levy any such tax, claiming they had immunity from all taxation except as provided in their contract contained in the Hewitt Act, which exempted them from all local taxation. A committee of the bankers and trust companies, with their counsel, met the Sinking Fund Commissioners and Mayor, with their counsel. The Mayor and Sinking Fund Commissioners pointed out that, because it had been supposed that the banks and trust companies would pay the license tax, no adequate *ad valorem* tax had been levied for the benefit of the Sinking Fund, and that, unless some arrangement could be made by which this tax could be paid at least for the current year, the Sinking Fund would be embarrassed in meeting its obligations. On the other hand, it was pointed out that the banks and trust companies could not pay the tax they were seeking to enjoin, for the obvious reason that the cases after payment would be mere moot cases. As the result of this conference there was an agreement made at the instance of and in the interest of the city, that a sufficient number of banks should be selected to sue, to illustrate every phase of the controversy, and that the other banks and trust companies should pay to the Sinking

Fund Commissioners, absolutely and without reservation, the difference between the amount which they were compelled to pay *the State* under the existing revenue law and the amount which they would have been compelled to pay under the Hewitt act, and that they would lend the commissioners the difference between the amount thus paid and the amount which the four per cent. tax would yield, and for this difference the Sinking Fund of the City of Louisville was to give, and did give, its notes. At a later date, at the earnest solicitation of the Sinking Fund Commissioners, all the banks and trust companies, except those actually engaged in litigation, surrendered these notes and agreed to pay, and did pay, the whole amount of the four per cent. tax during the pendency of the litigation. This, it was agreed, should be without prejudice to their rights. This meeting at the Sinking Fund office occurred on February 13, 1894, and the following is a copy of the minute as it appeared upon the books of the Sinking Fund Commissioners, a copy of the same being filed as Exhibit A, with each bill of complaint.

"SINKING FUND OFFICE, February 13, 1894.

"A committee, consisting of Messrs. Thomas L. Barret, John "H. Leathers and George W. Swearingen, appeared before the "Board on behalf of the banks who are members of the Louis- "ville Clearing House, and stated that it was the purpose of "said banks to resist the payment of the license fee demanded "of them under the license ordinance approved January 29, 1894, "on the ground that said banks were not legally liable to pay "the same; but, in order to save the Sinking Fund from any "embarrassment occasioned by their refusal to pay said license "fee, the banks, with two or three exceptions, were willing to "enter into an agreement whereby they would pay a part of the "amount demanded of them, and lend the Sinking Fund the "balance thereof, to be repaid with interest at four per centum "per annum, if it was finally decided and adjudged that the "banks were not liable to pay said license fees.

"After discussion, the President was, on motion of Mr. Tyler, "seconded by Mr. Summers, authorized to enter into the follow- "ing arrangement with the different banks, trust and title com- "panies, who will be subject to the payment of the license fees, "if the license ordinance is finally adjudged to be valid and "enforceable.

"First. To accept from each of said banks and companies a "payment equal to the difference between the amount they now "pay to the State taxes and the amount they would be required "to pay for State taxes under the provisions of what is known "as 'the 'Hewitt bill.' This sum shall be an actual payment,

"not to be repaid under any circumstances, but its payment "shall not in any manner, or to any extent, prejudice the banks "or companies paying it, or be taken as a waiver of any legal "right which they have in the premises.

"Second. In addition to making the above payments, the "said banks and companies, save those selected to test the "question involved, shall each lend the Sinking Fund a sum "which, added to said payment, will equal four per centum of "its gross earnings during the year 1893, and the Sinking Fund "will execute for said loans its obligations, agreeing to repay "the same with interest at four per centum per annum, when, "and if, it shall be finally adjudged by the court of last resort "that said banks or companies are not liable to pay the license "fee required by the ordinance aforesaid, but if it is finally "adjudged that they are liable to pay said license fee, then the "said loan shall be taken and deemed as a payment of said "license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the ques- "tions involved will each lend the Sinking Fund a sum equal "to four centum of their gross earnings for the year 1893, "and will receive therefor the obligations of the Sinking Fund "as above described.

"Fourth. This arrangement is to be entered into with the "understanding that the said banks and companies will institute, "without delay, and diligently prosecute such actions, as may "be necessary to settle and adjudge the right and liabilities of "the parties in the premises, and pending such proceedings the "Sinking Fund will not prosecute them, or any of them, for "doing business without license.

"A true copy. Attest: "J. M. TERRY,

"*Secretary and Treasurer.*"

This minute did not show as formally and distinctly as it should the precise agreement between the City and the banks, and, some time after the meeting, and for the purpose of preserving the exact evidence of the real agreement, a stipulation was entered into between the City and the Sinking Fund Commissioners, upon the one side, and the banks and trust companies, upon the other. That agreement is as follows:

"Stipulation between the City of Louisville, the Commissioners of "the Sinking Fund of the City of Louisville, and the Banks, "Trust and Title Companies of the City of Louisville:

"It is agreed between the City of Louisville, the Commis- "sioners of the Sinking Fund of the City of Louisville, repre- "sented by H. S. Barker, City Attorney, acting under the advice "and by the authority of the Board of Sinking Fund Commis- "sioners, given at a regular meeting of said Board, and the

"Mayor of the City of Louisville, on the one part, and the "various banks, trust and title companies of the City of Louis- "ville, acting by Humphrey & Davie and Helm & Bruce, their "attorneys, of the other part—

"First. That in February, 1894, it was agreed between the "City of Louisville and the Board of Sinking Fund Commis- "sioners, acting together in the interest of the said City, and "the various banks, trust and title companies acting through "their Committee, to-wit: Messrs. Thomas L. Barret, John "H. Leathers and George W. Swearingen, and their counsel, "to wit, Messrs. Humphrey & Davie and Helm & Bruce, that "the question of the liability of said banks and trust and title "companies to pay municipal taxes, either license or *ad valorem*, "otherwise than as provided by the revenue law, commonly "known as the 'Hewitt bill,' should be tested by appropriate "litigation looking to that end.

"Second. In order to effectually test the question as to all of "said companies, they were divided into three classes, it being "understood that all who had accepted the provisions of the "said Hewitt bill would fall in one or the other of the classes "named, to-wit:

"A. Banks whose charters had been granted prior to 1856:

"B. Banks whose charters had been granted subsequent to "1856.

"C. National Banks.

"It being understood that the trust and title companies which "had accepted the provisions of the Hewitt bill would fall in "class B, above named.

"Third. In pursuance of that agreement the Sinking Fund "Commissioners caused to be issued warrants against the Bank "of Kentucky, representing Class A, the Louisville Banking "Company, representing Class B, and the Third National Bank, "representing Class C; and these banks, respectively, applied "for writ of prohibition against the City Court of Louisville "proceeding with the hearing, that being the manner pointed "out by the City Charter for testing the validity of city ordi- "nances.

"It was distinctly understood and agreed at that time, and "this agreement was made for the best interest of all parties to "it, that if any bank in any class should eventually fail to estab- "lish the existence and validity of the contract which it was "claimed was made under the Hewitt bill, that all of that class "should thereafter regularly and promptly submit to the exist- "ing laws and pay their taxes. And it was also agreed that if "any bank of any class should succeed in establishing a con- "tract and the validity thereof under the Hewitt bill that that "should exempt all banks and companies falling within that

"class from the payment of taxes, except as provided in the "Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and "companies aforesaid paid into the Sinking Fund the amounts "of taxes claimed against them under the terms and conditions "named in the minutes of the Sinking Fund Commissioners of "February 13, 1894, an attested copy of which is hereto "attached as part hereof, but, at a later date, and in further reli- "ance upon said agreement, all said banks and companies, except "those actually involved in the test cases, paid the whole of the "amount of the taxes claimed as against them by the City of "Louisville, without reservation, until the question thus raised "should be finally disposed of.

"HUMPHREY & DAVIE,
"HELM & BRUCE,
"For the Banks, Trust and Title Companies of the City of Louisville.

"H. S. BARKER,
"City Attorney.

"Approved: C. H. GIBSON,
"President Commissioners Sinking Fund City of Louisville."

The method of enforcing obedience to an ordinance requiring payment of a license tax was by warrant from the Louisville Police Court; but, in pursuance of the agreement above mentioned, the City abandoned its warrants against all of the banks and trust companies, except the Bank of Kentucky, the Louisville Banking Company and the Third National Bank. These represented other institutions as follows: The Bank of Kentucky, whose charter was granted before 1856, represented itself and the Bank of Louisville, whose charter likewise antedated 1856. The Louisville Banking Company, a State institution, whose charter was granted since 1856, represented itself and every other State bank and trust company in the city whose charters were granted since 1856. The Third National Bank represented the National banks of the city. And it was agreed, as heretofore shown, that if any of these banks should succeed, all of its class should stand upon the same footing with reference to taxation, and that if any of these should fail, all of its class should thereafter pay taxes promptly according to the decision. And it was expressly stated in the agreement, just following the classification of the institutions into classes A, B, and C, that the trust companies should be considered as falling within class B, which, as we have just seen, was represented in the litigation by the Louisville Banking Company.

On the faith of this agreement, the various banks and trust companies in the city paid into the sinking fund of the city, about $150,000; no part of which would, in our opinion, have been paid if all of the institutions had sued, as was originally contemplated, and which they would have done, except for the earnest insistance

of the City of Louisville that the question at issue should be decided by test cases instead of by separate litigation upon the part of each institution.

Section 2922, being part of the statute governing cities of the first class, declares that in cases where a fine of $20, or less, may be imposed the defendant may, by writ of prohibition in the Jefferson Circuit Court, test the legality of the ordinance imposing the fine. Under the warrants sued out in the Police Court for the failure to pay the taxes under and in accordance with the ordinance, the fine would have been anywhere from $5 to $100. Accordingly the banks named, representing their several classes, brought suit, pursuant to the agreement heretofore mentioned, in the Jefferson Circuit Court, and sought a prohibition against the Judge of the Police Court, alleging that the court would, unless prohibited, proceed to fine the several banks for the failure to pay their taxes, and that the fine would not be less than $5 nor more than $100. The banks set up their contract under the Hewitt law, and claimed immunity from all taxation, except as provided by that law, and alleged that the ordinance seeking to tax them otherwise was void. The Jefferson Circuit Court, after a full hearing, decided that the ordinance was void so far as it affected the Bank of Kentucky; but that it was valid in so far as it affected the Third National Bank and the Louisville Banking Company. From the judgment in favor of the Bank of Kentucky, the City of Louisville and its representative, Judge Thompson, Judge of the Police Court, took an appeal; and from the judgments dismissing the petitions of the Louisville Banking Company and the Third National Bank they took appeals, making the City of Louisville and Judge Thompson appellees. When the cases came on in the Court of Appeals there were other cases on the docket from other localities than Louisville in which were banks and trust companies, making the same claim as to contract; and in the Court of Appeals the Commonwealth appeared by its Attorney-General, along with the different municipalities, who were represented by their respective official attorneys, and resisted the claim of the several banks and trust companies. Upon the part of the banks and trust companies it was claimed that they had an irrepealable contract to be taxed under and in accordance with the Hewitt act, and not otherwise, and that that contract lasted throughout the corporate existence of the several institutions. The State, through its Attorney-General, and the municipalities, through their several counsel, contended, first, that there never was any contract, and second, that if there was at any time a contract, the State had the right to retire from it at its pleasure, because of the sixth section of the second article of the Hewitt act, which declared: "This act shall be subject to the provisions of section 8, chapter 68, of the General Statutes." The section referred to is as follows:

"All charters and grants of or to corporations, or amend-
"ments thereof, enacted or granted since the 14th of February,
"1856, and all other statutes, shall be subject to amendment or
"repeal at the will of the Legislature, unless a contrary intent
"be therein plainly expressed: *Provided*, That whilst privileges
"and franchises so granted may be changed or repealed, no
"amendment or repeal can impair other rights previously
"vested."

On the part of the banks and trust companies it was insisted, with reference to this claim, first, that their contract was saved under the express reservation of the statute of 1856; and second, that, but for that reservation in the Hewitt act, it might have been contended that the State had disabled itself from repealing the charters of the several banks then subject to its control, and that the reservation was placed in the act in order to prevent the State from surrendering control over the charters; and that therefore there was but one way to terminate the contract, and that was to terminate the existence of the bank itself, which the State reserved the right to do if the public good required it.

The case was elaborately argued and briefed, and perhaps received as much consideration as the Court of Appeals ever gave to any case. It resulted in a decision by a divided court, four of the judges deciding with the banks and trust companies to the full extent of their contention, the opinion being delivered by Judge Pryor, the Chief Justice; and three of the Judges dissented, in an opinion delivered by Judge Paynter. (Bank Tax Cases, 97 Ky., 590.)

There can be no doubt, and it is not denied, that the question at issue between the banks and trust companies, upon the one side, and the State and its municipalities, upon the other, was finally adjudicated in favor of the banks and trust companies; the court holding that all institutions accepting the Hewitt act had contracts irrepealable in their nature and lasting throughout the corporate existence of the several institutions.

This opinion was delivered on June 1, 1895, and thereafter all the banks and trust companies received notice from the Auditor of Public Accounts requiring them to report and pay under the Hewitt act, and they did so for 1895, and under a similar notice for 1896. In addition to this they were called upon by the Auditor to pay, and they did pay, to the State for 1893 and 1894 the difference between the sums theretofore paid by them under the general revenue law of 1892 and the amount necessary to make their payments good under the Hewitt act; and this they did, although in the meantime they had paid under their contract with the City of Louisville about $150,000 into the Sinking Fund of the said City, no part of which, according to this decision of the Court of Appeals, did they in fact owe as taxes to the city.

* The court decided the fifth proposition in the negative, and trust companies now assign that ruling as error.

On the sixth proposition the court decided that the contract with national banks did not continue through the period of extended succession, and the national banks now assign that ruling as error.

The court decided the seventh and eighth propositions in the negative, and the national banks now assign each of these rulings as error.

Nearly two years after the rendition of this decision the Court of Appeals, as differently constituted, on the question being again raised *between other parties*, overruled their first decision and adopted the opposite view of the question.

It coming to the knowledge of the complainants that efforts were about to be made to assess them for the years 1895, 1896, 1897, and 1898 for city purposes, notwithstanding the former decision of the Court of Appeals and their payments thereunder, these suits were instituted.

Allegations were made as heretofore stated, and also sufficient to set out the facts herein recited, upon which a plea of *res adjudicata* was made.

The Circuit Court sustained that plea not only as to the banks actually parties to the former litigation, but as to all brought into privity by the contract with the city, with the exceptions already stated. Several opinions were rendered in the different cases, and all these opinions are reported in 88 Federal Reporter from pages 383 to 427.

ARGUMENT.

The questions of law which we understand will be argued are:

1st. Did the Circuit Court have jurisdiction?

2d. Was there jurisdiction in equity?

3d. Has the question at issue been heretofore adjudged in favor of the complainants?

4th. Does this adjudication protect only the banks actually engaged in the former litigation, or does it extend to the other institutions which entered into the contract with the city to abide the result thereof, and acted on the faith of it?

5th. Have the trust companies an equal right with the banks to avail themselves of the plea of *res adjudicata?*

6th. Does the extension of the charter of a National Bank under the act of Congress of July, 1882, preserve the old corporate existence and the contract made between it and the State, or does it create a new corporate existence?

7th. Is the General Revenue law of Kentucky inconsistent with the National Banking act in levying a tax upon the property of the bank instead of upon the shares of the stockholders?

8th. Does the principle of uniformity guaranteed by the National Banking act protect National Banks in the City of Louisville which, for any reason, can not claim a contract under the Hewitt act? ✱

These in their order.

I.

Did the Court Have Jurisdiction?

The jurisdiction of the court extends, by the act of 1888, to all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and cost, the sum of $2,000, and arising under the Constitution or laws of the United States (Supplement to Revised Stats. 611).

The claim of the bills is that the officers of the State are about to enforce against complainants a law passed by the State since the making of the contract with the State relied upon by the complainants; and this law, it is alleged, impairs the obligation of the pre-existing contract, and is therefore in violation of that provision of the Federal Constitution which forbids any State from passing any law impairing the obligation of a contract, and, as to the National Banks involved, it is further insisted that the tax sought to be enforced against them is in violation of the National Bank act.

It is clear, therefore, that the suits arise under the Constitution and laws of the United States. We do not think it needs further argument to show the jurisdiction of the court.

II.

Was There Jurisdiction in Equity?

We next proceed to consider whether the court had jurisdiction in equity of the bills. It must be remember that in insisting upon this contract the complainants are, in effect, seeking the specific performance of the contract as against the State, and specific performance is essentially of equitable cognizance; and whenever specific performance of such a contract as the one involved is sought, equity will enjoin the collection of the tax attempted to be collected in violation of the contract. Relief by injunction against taxes, in violation of a contract of exemption, has always been allowed in the nature of an exception to the general rule. 1 High on Injunctions, 530; 1 Spelling on Eq. Relief, 672.

In addition to this it is alleged, as has been seen, that, unless the defendants are restrained, attempts will be made by distraint and levy or by suit to collect these taxes from the complainants. It was conceded by the learned counsel for the City of Louisville in the court below, that, even if he did not resort to his right of distraint, but brought a suit to recover on the tax bills, that upon a judgment obtained thereon execution would issue which might be levied upon any property subject to levy, or that judgment might be enforced by the ordinary equitable means, such as a bill of discovery, whereby the creditors of the banks could be restrained from paying their debts to the banks, or whereby execution might be levied upon the money of the bank.

In addition to this, the statute of the State for the government of cities of the first-class contains this provision:

> "Any court of competent jurisdiction, not inferior to a Circuit "Court, may, in the established modes of proceedings, and upon "existing principles of law or equity, give redress against unlaw- "ful distraints or garnishments of rents that may be wrongfully "made or threatened under color of this act, but no injunction "shall be granted in such proceeding, except by the court or its "Judge, nor otherwise than upon notice to said city, and after "a hearing." (Ky. Statutes, Sec. 3008.)

This provision occurs in that part of the statute devoted to revenue and taxation, and it is not denied that it relates to unlawful distraints and garnishments as applied to the collection of taxes.

It will be observed that this statute declares that the court may, in the established modes of proceedings, and upon existing principles of law and equity, give redress, etc. There can be little doubt

that the intention of the Legislature in the use of these terms was simply to recognize what had been regarded in Kentucky as the established modes of proceedings and the existing principles of equity in reference to restraining the collection of taxes.

It will be admitted by counsel for the other side that the law is settled in Kentucky that equity will restrain by injunction either an illegal assessment or the collection of an illegal tax.

In the case of Gates vs. Barret, 79 Ky., 205, in discussing this question, the Court said:

> "The right to have an injunction to restrain the collection "of an illegal tax has been so long recognized and acted upon "in this State, that it is unnecessary to stop to inquire upon "what ground that jurisdiction is exercised by courts of equity."

And this part of the opinion was quoted with approval in the case of Norman vs. Boaz, 85 Ky., 560.

In the case of Baldwin vs. Shine, 84 Ky., 502, the court distinctly held that it was proper for a court of equity to enjoin not only the collection of an illegal tax, but a proposed illegal assessment, and this case was approved in Baldwin vs. Hewitt, 88 Ky., 676, and in Cassidy vs. Young, 92 Ky., 232. Further citation of authority on this question is of course useless.

We concede that this Court has held that equity will not take jurisdiction to restrain the collection of taxes upon the mere ground of invalidity, but that there must be some other ground of equitable cognizance.

But the Court has also held, and we think that is the law as now distinctly recognized by the Court, that where there is a statute of the State—as we have just seen there is in Kentucky—which allows the remedy by injunction to restrain unlawful taxes, the Federal Court sitting in equity will enforce that remedy just as the State courts would.

In Cummings vs. National Bank, 101 U. S., 154, the Court, through Mr. Justice Miller, in speaking upon this question, said:

> "But the statute of the State expressly declares that suits "may be brought to enjoin the illegal levy of taxes and assess- "ments, or the collection of them. Section 5848 of the Re- "vised Statutes of Ohio, 1880, Vol. LIII.; Laws of Ohio, 178, "Sections 1 and 2. And though we have repeatedly decided "in this court that the statute of a State can not control the "mode of procedure in equity cases in Federal Courts, nor "deprive them of their separate equity jurisdiction, we have "also held that, where a statute of a State created a new right "or provided a new remedy, the Federal Courts will enforce "that right, either on the common law or equity side of its "docket, as the nature of the new right or new remedy requires.

"Van Norden vs. Morton, 99 U. S., 378. Here there can be no "doubt that the remedy by injunction against an illegal tax, "expressly granted by the statute is to be enforced, and can only "be appropriately enforced, on the equity side of the court.

"The statute also answers another objection made to the "relief sough, in this suit, namely, that equity will not enjoin "the collection of a tax except under some of the well-known "heads of equity jurisdiction, among which is not a mere over- "valuation, or the illegality of the tax, or in any case where "there is an adequate remedy at law. The statute of Ohio "expressly provides for an injunction against the collection of a "tax illegally assessed, as well as for an action to recover back "such tax when paid, showing clearly an intention to author- "ize both remedies in such cases."

This opinion was expressly recognized as authority in the case of Shelton vs. Platt, 139 U. S., 599, in which the Court distinguished that case from the one under consideration by saying:

"In Cummings vs. National Bank, the jurisdiction was main- "tained upon the ground of preventing multiplicity of suits, as "well as that the remedy by injunction against an illegal tax "was expressly granted by a statute of the State whose levy of "tax was drawn in question."

It was also expressly recognized in the case of Greeley vs. Lowe, 155 U. S., 58. In an opinion by Mr. Justice Brown, page 75, the Court said:

"This court has held in a multitude of cases that where the "laws of a particular State gave a remedy in equity, as, for "instance, a bill by a party in or out of possession, to quiet "title to lands, such remedy would be enforced in the Federal "Courts, if it did not infringe upon the constitutional rights of "the parties to a trial by jury."

Citing as authority, among other cases, the case of Cummings vs. National Bank, *supra*.

Quite an able discussion of the question of how far the Federal Court will enforce, on the equity side of the docket, equitable remedies allowed by the statutes of the State will be found in Darragh vs. H. Wetter Manufacturing Company, etc., 78 Federal Reporter, 7; a decision by the Circuit Court of Appeals for the Eighth Circuit.

In discussing this question, the Circuit Court's opinion in the cases at bar is very full, and we insert it here in lieu of further argument:

"Do the facts stated in the bill bring it within the equity "jurisdiction of the court? It is well settled that in the Federal "courts an action in equity will not lie to restrain the collection "of a tax on the sole ground that it is illegal and void, and "independently of every other consideration. See Rich vs. "Braxton, 158 U. S., 375, 405; 15 Sup. Ct., 1006. It must appear "from the special circumstances averred that there is no adequate "remedy at law, and that there is some recognized ground for "equity jurisdiction, such as that the enforcement of the tax "would lead to a multiplicity of suits or produce irreparable "injury. Ogden City vs. Armstrong, 168 U. S., 224, 236; 18 "Sup. Ct., 98; Express Co. vs. Seibert, 142 U. S., 339, 12 Sup. "Ct., 250; Allen vs. Car Co., 139 U. S., 658, 661; 11 Sup. Ct., 682; "Shelton vs. Platt, 139 U. S., 591; 11 Sup. Ct., 646; Railway Co. "vs. Cheyenne, 113 U. S., 516, 525; 5 Sup. Ct., 601; Hame- "winkle vs. Georgetown, 15 Wall, 547; Dows vs. City of Chi- "cago, 11 Wall, 108. What are the remedies at law which the "complainant has? If the collecting officers proceed to collect "the tax by distraint, the bank may, under the duress of the "threatened trespass, pay the taxes alleged to be illegal, and then "sue the city of Louisville, the county of Franklin, and the city "of Frankfort to recover them back. Railroad Co. vs. Com- "missioners, 98 U. S., 541. It is to be observed, however, "that no such action will lie except upon payment under duress. "The bank could not simply pay under protest, and sue to "recover back. Such a payment would be voluntary. There "is no statute of Kentucky providing such a remedy, as "there was in Tennessee in the case of Shelton vs. Platt. The "remedy of paying and suing to recover back in Kentucky ex- "ists only when the collecting officer resorts to distraint. But "the collecting officers are not obliged to collect the taxes by "distraint; they may resort to a simple suit at law for them. "In that case the bank may defend on the ground of the "invalidity of the law under which the taxes have been assessed. "This remedy, except where the taxes are a cloud upon real "estate, would ordinarily be adequate; but, under the provisions "of the Revenue law of November, 1892, we do not think it is. "By that law, the bank, on failing to pay the taxes assessed, "according to its provisions, within thirty days after notice "from the collecting officer, is subjected to a penalty of 10 per "cent. and to a fine of $50 a day for every day of the delin- "quency, to be enforced by indictment or by civil action. It "follows that the remedy of defending a suit at law for taxes "under this revenue act is attended with the risk of being com- "pelled to pay $50 a day for every day of the time necessarily "consumed in the reasonable litigation of the question of the "validity of the tax. By bill in equity, the bank may enjoin "the assessment, and pending the litigation, however long the

"delay, no fines or penalties can accrue against the unsuccess-
"ful litigant, because, by the terms of the act, they do not
"begin to accrue until thirty days after notice to pay has been
"given by the collecting officer. It is manifest that the remedy
"at law by defending a tax suit in such cases is attended with
"a great and oppressive burden of risk, which is absent in
"an action in equity. The remedy at law is, therefore, entirely
"inadequate. Smythe vs. Ames, 169 U. S., 466, 518; 18 Sup. Ct.,
"418; Express Co. vs. Seibert, 44 Fed. Rep., 315. It is no
"answer to say that the payment of the tax and the action to
"recover it back constitute an adequate remedy, because no
"such action will lie, as already explained, unless there is a dis-
"traint, actual or threatened, and the collecting officer, by not
"distraining, may wholly deprive the taxpayer of this remedy.
"Indeed, the counsel for the city of Louisville vigorously con-
"tends that the collecting officer in that city has no power to
"distrain for bank taxes. However this may be, it would seem
"clear that a court of equity will not withhold relief from a
"suitor merely because he may have an adequate remedy at law
"if his adversary chooses to give it to him. The remedy at
"law can not be adequate if its adequacy depends upon the will
"of the opposing party. To refuse relief in equity upon the
"ground that there is a remedy at law, it must appear that the
"remedy at law is 'as practical and efficient to the ends of jus-
"'tice and its prompt administration as the remedy in equity.'
"Boyce vs. Grundy, 3 Pet., 210, 215; Sullivan vs. Railroad Co.,
"94 U. S., 806, 811. And the application of the rule depends
"upon the circumstances of each case. Watson vs. Sutherland,
"5 Wall., 74, 79.

"The practice of the State Courts of Kentucky in issuing
"injunctions against the collection of taxes can not, of course,
"be a controlling consideration in determining the limits of the
"equity jurisdiction in the Federal Courts in such cases; for it
"is settled that if a case 'in its essence, be one cognizable in
"'equity, the plaintiff (the required value being in dispute) may
"'invoke the equity powers of the proper Circuit Court of the
"'United States whenever jurisdiction attaches by reason of
"'diverse citizenship or upon any other ground of Federal juris-
"'diction.' Smith vs. Ames, 169 U. S., 466, 516; 18 Sup. Ct.,
"418. But it is worthy of note that the Court of Appeals of
"Kentucky has held that, in the absence of a statute allowing
"an action to recover back from the State taxes illegally col-
"lected, the remedy by injunction is the only adequate one.

"In Gates vs. Barnett, 79 Ky., 295, 296, the Court, in a suit
"to enjoin a distraint upon certain tobacco, for the collection of
"taxes, said:

"'The right to have an injunction to restrain the collection
"'of an illegal tax has been so long recognized and acted upon

" ' in this State that it is unnecessary to stop to inquire upon
" ' what ground that jurisdiction is exercised by courts of equity.
" ' The jurisdiction in this case, however, may be placed upon
" ' the ground of the inadequacy of the remedy at law. The
" ' officer, acting in good faith and under color of right, is justi-
" ' fied by this process, and is not liable as a trespasser ; and, as
" ' a suit would not lie against the State directly, the only com-
" ' plete remedy is by injunction.'

" It is by no means clear that distraints or threatened
" distraints against a bank, in view of the character of its busi-
" ness, may not involve such serious detriment to its business,
" and incidentally to the public, as to justify equitable interven-
" tion.

" In the case of Lenawee Co. Sav. Bank vs. City of Adrian,
" 67 Mich., 273, 276 ; 33 N. W., 304, 306, a levy upon and seizure
" of the bank furniture and fixtures was in progress when an
" injunction was issued. Mr. Justice Campbell, speaking for
" the court, said:

" ' No point was made in the pleadings or on the argument
" ' against the jurisdiction of equity in this case. As the bank
" ' was not liable to taxation at all on its personal property, and
" ' the levy was made in such a way as to directly interfere with
" ' its business, the case comes within the analogies of the cases
" ' represented by Osborn vs. Bank, 9 Wheat., 738, from which
" ' it can not be readily distinguished. The court below does
" ' not appear to have doubted the jurisdiction, although decid-
" ' ing in favor of defendants on the merits.'

" In Railway Co. vs. Cheyenne, 113 U. S., 516, 525; 5 Sup.
" Ct., 601, 605, Mr. Justice Bradley said :

" ' It can not be denied that bills in equity to restrain the
" ' collection of taxes illegally imposed have been frequently
" ' sustained. But it is well settled that there ought to be
" ' some equitable ground for relief besides the mere illegality of
" ' the tax ; for it must be presumed that the law furnishes a
" ' remedy for illegal taxation. It often happens, however, that
" ' the case is such that the person illegally taxed would suffer
" ' irremediable damage or be subject to vexatious litigation if
" ' he were compelled to resort to his legal remedy alone. For
" ' example, if the legal remedy consisted only of an action to
" ' recover back the money after it had been collected by dis-
" ' tress and sale of the taxpayer's lands, the loss of his free-
" ' hold by means of a tax sale would be a mischief hard to be
" ' remedied.'

" The interference with the business of a bank and the
" injury to its credit caused by a distress against its personal
" property would seem to be a mischief equally hard to be
" remedied by a mere suit to recover the money back when thus
" collected.

"If it were necessary, we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it?

"In Osborne vs. Bank, 9 Wheat., 738, 842, Chief Justice Marshall said:

"'The single act of levying the tax, in the first instance, is 'the cause of an action at law; but that affords a remedy only 'for the single act, and is not equal to the remedy in chancery, 'which prevents its repetition and protects the privilege.'

"See also, Morris Canal & Banking Co. vs. Mayor, etc. of Jersey City, 12 N. J. Eq., 227; High Inj., Sec. 530.

"In addition to the suits for future taxes, there is also danger of harassing suits for fines and penalties which the law permits to be brought for each days' delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief." (88 Fed. R., 309, &c.)

III.

Has the Question at Issue Been Heretofore Adjudged in Favor of the Complainants?

The facts already stated are sufficient to show that the sole object of the institution of the suits in the State court was to bring to a judicial test the question of whether the complainants had an irrepealable contract under their acceptance of the Hewitt act. That was the question argued by all the parties, and a reading of the opinion of the Court of Appeals, reported in 97 Ky., 599, will conclusively show that that was *the* question considered and decided by the court.

It would now be a work of supererogation to review the authorities on this question of *res adjudicata*. The recent case of the City of New Orleans vs. the Citizens' Bank of Louisiana, 167 U. S., 372, is conclusive of the question. It expressly approves the cases of Cromwell vs. Sac, 94 U. S., 353, and the Last Chance Mining Co. vs. Tyler Mining Co. 157 U. S., 687, and distinctly applies the doctrine of *res adjudicata* to taxes, as was done by the Circuit Court of Appeals for the Eighth Circuit in the case of St. Joseph & G. I. R. Co. vs. Steel, 63 Fed. Rep., 867. The facts of the New Orleans Bank cases so far as it is necessary to state them, are about as follows:

The State of Louisiana had by an act exempted the Citizens Bank of Louisiana from taxation to a certain extent. The bank was chartered for a particular time, and afterwards its charter was extended. Before the extension, attempts under various acts, were made several times by the officers of the State to enforce the prohibited taxes against the bank, and the bank several times appealed to the State courts, and each time received an adjudication that it was not liable to the tax, and the assessment was ordered to be canceled. After the bank had entered upon its extended existence two attempts were made to tax it under another law, and the bank applied on both occasions to the court for an injunction, and in each instance the injunction was granted and the bank exempted from taxation under the extended charter.

From these last decisions no appeal was prosecuted, as had been the case under the old charter. Another act being passed by the Legislature, under which it was thought that this bank could be subjected to the taxation from which it was freed by its contract, another attempt was made to enforce the taxes against it, and this time the bank sought the Federal forum, and filed its bill seeking an injunction in the Circuit Court of the United States for the

Eastern District of Louisiana. In the bill it pleaded its contract of exemption, and that the attempt being made to enforce the taxes would impair the obligation of a contract protected by the Federal Constitution, and the bill also, aside from alleging its contractual exemption, alleged that such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The prayer was for a restraining order and for an injunction enjoining the Board of Assessors from taking the steps necessary to make the assessment, from completing the assessment, and the collectors from collecting any tax thereunder. The court below adjudged in favor of the exemption, and the appeal was prosecuted to this court. We neglected to mention a circumstance noted by the court, that for a period of several years there was no attempt to tax the bank in violation of its charter contract.

The Court, in considering the question of *res adjudicata*, eliminated from consideration the several adjudications made during the existence of the old charter before the extension, and turned its opinion entirely upon the decisions of the court of first instance, which had become final by the failure to prosecute appeals therefrom. The positions of the other side against the plea of *res adjudicata* are stated, as follows, in the language of the Court:

> "The reasons relied on to establish that these judgments do "not constitute the thing adjudged are embodied in three propo- "sitions. First, because although it is true the officials who are "made defendants are the successors in office of the officers who "were impleaded in the judgments relied upon, as they are not "the same natural persons, therefore, there is a want of identity "of parties; second, because the records do not show with suffi- "cient certainty that these judgments were based on the iden- "tical claim of exemption from taxation which is now asserted, "and, therefore, that the judgments do not establish that the "matter here in issue was necessarily therein concluded; third, "because, whatever as a general principle may be the efficacy "of the thing adjudged, that rule has no application to taxes of "different years, since a judgment decreeing a tax of one year "illegal can never be *res adjudicata* as to a tax of a future year, "although the right to tax for a future year is resisted upon the "same facts and between the same parties, and upon the identical "legal grounds held to be conclusive in a judgment previously "rendered between them" (p. 387).

As to the first contention, the Court waives it aside with the statement that it is without merit.

As to the second proposition, the Court devotes more time. The Court takes up the petition filed in the suit to show the ground upon which the judgment was sought, and comments upon the

acts of the officers under the judgment as furnishing evidence of what was included in the judgment, and what the judgment was understood to be. It seems in that case that the complainant not only alleged that the State was without power to tax by virtue of the charter provisions, but it alleged that the tax was excessive; therefore it was necessary for the court to devote some time to show, which it does show quite conclusively, that the judgment was based upon the alleged claim of exemption, and not upon the allegation that the tax was excessive, since it did not order the reduction of the tax, but its cancellation. The Court also comments upon the fact that after these judgments were rendered there was an acquiescence in them by the officers of the State for four or five years, and the banks were not assessed. The Court then proceeded as follows:

"It results from the foregoing, that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year can not be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense and of the facts upon which the defense is founded.

"There is a difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances. On the other hand, the reasoning that this must be the rule, because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjuged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine, first, the proposition that because a tax of one year is a different demand from the tax of a subsequent year, therefore *res adjudicata* as to one can never apply as to the other, and the

" second question of whether as a matter of public policy the " thing adjudged applies to taxes at all.

" The proposition that because a suit for a tax of one year is " a different demand from a suit for a tax for another, therefore " *res judicata* can not apply, whilst admitting in form the princi- " ple of the thing adjudged, in reality substantially denies and " destroys it. The estoppel resulting from the thing adjudged " does not depend upon whether there is the same demand in " both cases, but exists, even although there be different de- " mands, when the question upon which the recovery of the " second demand depends has under identical circumstances and " conditions been previously concluded by a judgment between " the parties or their privies. This is the elemental rule, stated " in the text books and enforced by many decisions of this " court. A brief review of some of the leading cases will make " this perfectly clear.

" In Bank vs. Beverly (1 How., 134-139), it was held that a " construction of a will affecting the rights of the parties must " govern in subsequent controversies between the same parties, " without reference to the different nature of the demands. In " Tioga R. R. Co. vs. Blossbury, &c., R. R. Co. (20 Wall., 137) " Mason Lumber Co. vs. Buchtel (101 U. S., 638), it was held " that when the proper construction of a contract was in contro- " versy, the construction adjudged by the court would bind the " parties in all future disputes.

" In Cromwell vs. Sac (94 U. S., 353), after a full statement " of the nature of the estoppel resulting from the thing adjudged " where the demand was the same in both cases, the court then " considered the extent of the estoppel where the causes of " action were distinct, and said (p. 353):

" ' But where the second action between the same parties is " ' upon a different claim or demand, the judgment in the prior " ' action operates as an estoppel only as to those matters in " ' issue or points controverted upon the determination of which " ' the finding or verdict was rendered. In all cases, therefore, " ' where it is sought to apply the estoppel of a judgment ren- " ' dred upon one cause of action to the matters arising in a suit " ' upon a different cause of action, the inquiry must always be " ' as to the point or question actually litigated and determined " ' in the original action, not what might have been thus liti- " ' gated and determined. Only upon such matters is the judg- " ' ment conclusive in another action.'

" It is unnecessary to multiply citations of authority, as the " subject has been quite recently fully considered and passed " upon by this court. In Last Chance Min. Co. vs. Tyler Min. " Co. (157 U. S., 687), where an estoppel resulting from the " thing adjudged was enforced, this Court said (p. 687):

"'The law in respect to estoppel by judgment is well settled,
"'and the only difficulty lies in the application of the law to
"'the facts. The particular matter in controversy in the
"'adverse suit was the triangular piece of ground, which is not
"'the matter of dispute in this action. The judgment in that
"'case is therefore not conclusive in this as to matters which
"'might have been decided, but only as to matters which were
"'in fact decided. (Hopkins vs. Lee, 6 Wheat., 109; Smith vs.
"'Kernochen, 7 How., 198; Pemington vs. Gibson, 16 How., 65;
"'Stockton vs. Ford, 18 How., 418; Washington & Steam
"'Packet Co. vs. Sickles, 24 How., 333; S. C. 5 Wall., 580;
"'Lessee of Parrish vs. Ferris, 2 Black, 606; Cromwell vs.
"'County of Sac, 94 U. S., 351; Davis vs. Brown, 94 U. S., 423;
"'Russell vs. Place, 94 U. S., 606; Campbell vs. Rankin, 99
"'U. S., 261; Lumber Co. vs. Buchtel, 101 U. S., 638; Stout vs.
"'Lye, 103 U. S., 66; Nesbit vs. Riverside Independent District,
"'144 U. S., 610; Johnson Company vs. Wharton, 152 U. S.,
"'252.)'

"And the law of Louisiana is exactly in accord with the rul-
"ings of this court, for, as said by the Supreme Court of Louis-
"iana in Heroman et al., vs. Louisiana Institute of Deaf and
"Dumb, et al. (34 La. Ann., 814):

"'No principle of the law is more inflexible than that which
"'fixes the absolute conclusiveness of such a judgment upon the
"'parties and their privies. Whether the reasons upon which
"'it was based were sound or not, and even if no reason at all
"'were given, the judgment imports absolute verity, and the
"'parties are forever estopped from disputing its correctness.
"'(Cooley on Const. Lim., p. 47, *et seq.*, and authorities there cited.)

"'Matters once determined in a court of competent jurisdic-
"'tion may never again be called in question by parties or
"'privies against objection, though the judgment may have
"'been erroneous and liable to, and certain of, reversal in a
"'higher court.'
"(Bigelow Est., 3d ed., Outline, pp. lxi, 29, 57, 103.)

"The estoppel extends to every material allegation or state-
"ment which, having been made on one side and denied on the
"other, was at issue in the cause, and was determined therein.
"(Aurora vs. West, 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14
"An., 576; 19 La., 318; 5 N. S., 664; 11 M., 697; 14 La., 233;
"5 N. S., 170.)

"It follows, then, that the mere fact that the demand in this
"case is for a tax for one year and the demands in the adjudged
"cases were for taxes for other years, does not prevent the
"operation of a thing adjudged, if, in the prior cases, the ques-
"tion of exemption was necessarily presented and determined
"upon identically the same facts upon which the right of exemp-
"tion is now claimed.

"The argument that, as a matter of public policy the princi-
"ple of the thing adjudged should be held not to apply to con-
"troversies as to taxation, if there be merit in it, should be
"addressed to the lawmaking and not to the judicial depart-
"ment. But if the judicial mind could entertain the sugges-
"tion, it seems clear that it is without real merit. In its ulti-
"mate aspect it asserts that no question concerning government
"or public authority ought ever to be submitted to judicial
"investigation. Indeed, the contention is that there is no power
"in courts of justice to consider any question of taxation or ren-
"der any judgment in relation thereto. That this is the result
"of the proposition is manifest from the fact that the very
"essence of judicial power is that when a matter is once ascer-
"tained and determined it is forever concluded when it arises
"again under the same circumstances and conditions between
"parties or their privies. To admit the judicial power on the
"one hand, and to deny on the other the very substance and
"essence of such power, is not only contradictory, but destruc-
"tive of the fundamental conceptions upon which our system of
"government is based. Under this theory the cause under con-
"sideration should not be entertained, but should be dismissed.
"Accepting the argument in its full consequence, every judg-
"ment rendered by this court from the foundation of the gov-
"ernment, declaring a particular tax or burden unconstitutional,
"imports no efficacy whatever. Every decree of this court
"enforcing taxation in order to discharge obligations previously
"contracted, where the right to the tax was a part of the obli-
"gation, is deprived of the sanctity of the thing adjudged, for
"manifestly if the estoppel of the thing adjudged does not arise
"from a judgment preventing taxation, such an estoppel can
"not also result from a judgment enforcing taxation.

"It is contended, however, that the asserted theory finds sup-
"port in two authorities, one a decision of this court, Keokuk &
"Western R. R. vs. Missouri (152 U. S., 301), and the other,
"Davenport vs. Chicago, Rock Island, &c., Railway, (38 Ia., 633,
"640.) But that these authorities do not sustain the contention
"is demonstrable. In the Keokuk case the court held that the
"controversy which it decided was not between the same parties
"as was the controversy in the case wherein the judgment was
"rendered which was relied upon as *res judicata*. The two
"judgments not being between the same parties, there could
"have been and was no necessity for deciding whether, if the
"judgment had been between the same parties or their privies,
"it would have been *res judicata*. True, it is, that in the Keo-
"kuk case the opinion, *arguendo*, discusses the question of whether
"a judgment against the validity of a tax for one year would be
"a bar to a suit for taxes for a subsequent year. But that this
"reasoning was not considered as relating to a case where the

" validity of the tax was resisted on a particular ground, which " particular and special defense had been previously held be- " tween the same parties to be valid under identically the same " conditions and circumstances, becomes clear when the context " of the opinion is examined, and it is discovered that it approves " and quotes the case of Cromwell vs. Sac, the opinion in the " Keokuk case, saying: 'If there were any distinct question lit- "igated and settled in the prior suit, the decision of the court " upon this question might raise an estopel in another suit upon " the principle stated in Cromwell vs. Sac, 94 U. S., 351.' To " seek, then, to avail of the general language used in the opinion " in the Keokuk case without taking note of the circumstance " that it was there said that the estopel would exist even as to " a tax in a case like this, is, in reason, to misinterpret the opinion " and make it cover the very case which it in express language " declared it was not intended to govern. It may also be con- " ceded that language was used in the course of the opinion in " Davenport vs. Chicago, Rock Island, &c., Railway (*supra*), which " is susceptible of the interpretation that under no circumstance, " even between the same parties, would a judgment as to the tax " of one year operate as the thing adjudged as to the tax of a " future year. But that case stands alone, and the language " therein used has been since, if not repudiated, at least qualified, " by the Supreme Court of Iowa to the extent necessary to " bring that case in harmony with the true and universal doc- " trine so often laid down by this court. In Goodnow vs. " Litchfield (59 Ia., 226), where the Davenport case was pressed " as an authority upon the Supreme Court of Iowa, that Court, " in an opinion on a rehearing, said:

" ' It is undoubtedly true that the taxes of each year ordinarily " ' constitute separate and distinct rights or causes of action. But " ' when an action is brought to recover taxes paid in one year, " ' and an action is afterwards brought to recover for the taxes " ' paid in a subsequent year, and the adjudication in the first is " ' pleaded as a bar to the recovery in the second action, the ques- " ' tion whether the estoppel is effectual will depend upon the " ' issues in the two actions.

" ' If the right to recover and the defense thereto are based " ' upon necessarily the same grounds, why litigate again the " ' question that has been determined? In such case the very " ' right of the matter, is determined by a court of competent " ' jurisdiction. It is not essential that the causes of action should " ' be the same, but it is essential the right or title should be; " ' that is, the issue in both actions and the matter on which the " ' estoppel depends must be the same, or substantially so. The " ' very matter or thing which it is sought to litigate must have " ' been adjudicated in the prior action. In such case the bar or

"'estoppel is complete. This rule will not, we think, be dis-
"'puted. Therefore authorities are not required in its support;
"'but see Merrian vs. Whittmore (5 Gray, 316.)'

"It follows, then, that the theory by which it is sought to "take questions of taxation entirely out of the reach of the "rule of the thing adjudged is not only without foundation in "reason, but is also without support of authority, since the "case from this court, which is cited to sustain it, can not prop-"erly be said to maintain the contention, and the other from "the Supreme Court of Iowa has been either overruled or "qualified" (p. 395, &c).

The counsel for the City of Louisville seek to avoid the effect of the judgments heretofore rendered and pleaded in these cases and the effect of the recent decision by contending—

1st. That there is not an identity of person.

2d. That the matter now in dispute is not the same matter as was in dispute in the former adjudication.

Upon the first proposition we have already shown that though the suit is against R. H. Thompson, Judge of the Police Court of the City of Louisville, it is so brought because he is the representative of the City of Louisville pointed out by the statute as the one against whom such a suit shall be brought to test the validity of the asserted right of the city under the ordinance passed by the General Council. It is, of course, very clear that Thompson was sued not in his individual but in his representative capacity, and that in this capacity his principal was the City of Louisville, which would be bound as privy by the judgment; but the fact is, as shown by the record, that when the Bank of Kentucky won its case in the Circuit Court the "City of Louisville," in its own proper name, prosecuted the appeal, and that from the judgments dismissing the petitions of the Louisville Banking Company and the Third National Bank, the appeals were prosecuted against the "City of Louisville" in its own proper name.

It furthermore distinctly appears from the reported case, 97 Ky., 598, and from the record, that the counsel for the city appeared and made his argument in behalf of the city, so that it seems to us that this point is clearly not well taken.

The next point is that the adjudication is not conclusive, because all the judgment did was to prohibit Judge Thompson from proceeding under the ordinance on the ground that the ordinance was void, and that inasmuch as that ordinance was, in another case, held void, for another reason, therefore the judgment presents no bar.

This proposition of the counsel, it seems to us, is most clearly and distinctly answered by the New Orleans Bank Tax case. If we look to the pleadings, we find that the validity of the ordinance

was not challenged in the Bank cases upon any ground except that the banks had an inviolable contract with the State, the obligation of which would be impaired if the ordinance was enforced. The opinion of the court shows, too, that the ordinance was not held void for any ground stated in the case of Reed vs. City of Louisville, 97 Ky., 394, but solely and distinctly upon the ground that the banks had a contract, made under the terms of the Hewitt act, which was beyond the power of the State to repeal or withdraw from.

It will be also noticed that the judgment entered upon the mandate of the Court of Appeals adjudges in so many words that the petition states a good cause of action ; and the only cause of action stated in the petition is the claim of invalidty of the ordinance because of the existence of that very contract.

Again, it may be said here, as was said in the New Orleans Bank case, that the contemporaneous construction placed upon the judgment by the executive officers, including those of the city of Louisville, makes it entirely conclusive that the judgment rested alone upon the claim of contract. For instance, as is alleged in the bills, as soon as the case was decided in June, 1895, the Auditor of the State called upon all the banks and trust companies, including the complainants, to pay into the treasury of the State the difference between what had been exacted under the revenue act of November 11, 1892, and what they should have paid under the Hewitt act; and these complainants and other institutions of similar kind in Kentucky were compelled to pay, and did pay, the taxes for the years of 1893, 1894, and 1895, and have since that date been compelled to pay at the same rate, being the rate prescribed by the Hewitt act.

Again, as conclusively showing that the city officers were not in doubt as to the meaning of the judgment, as the counsel for the city seems now to be, there was no attempt to levy an *ad-valorem* tax after the ordinance had been held to be void, nor to tax the banks in any way at all, except upon their bank building, as *allowed by the Hewitt act.* So that it is just as conclusively settled in this case as it was in the New Orleans Bank Tax case, that the matter in dispute now is the same matter which had been put in dispute before and distinctly adjudged.

The Circuit Court, in the cases at bar, in passing upon the question whether the point adjudged by the Court of Appeals in the former litigation was exactly the same as that now raised in the present litigation, used this language :

> " In the case before us there can be no question, from the " statement of facts and an examination of the records in pre- " vious cases as set forth therein, that the question which was " adjudged in them was the identical question presented in the " same way and for the same purpose as in the case at bar, to

" wit, whether there was a contract between the bank and the " State which forbade the imposition of higher taxes than those " imposed under the Hewitt act. It was distinctly adjudged, in " behalf of the complainant against Franklin county and the " City of Frankfort, by the Court of Appeals, by the decision " rendered in 1895, and by a mandate issued from that Court to " the Franklin Circuit Court, that such a contract in fact " existed, and rendered null and void the provisions of the rev- " enue act of November 11, 1892, under which the defendants " now seek to impose taxes upon the complainant.

" It is vigorously pressed upon us, however, that the judg- " ment in the prohibition suit can not be relied upon by the " complainant bank to establish the existence of a contract of " exemption between it and the city of Louisville, because there " is nothing in the record to show that the issue made by the " demurrer to the petition in that suit was the existence of such " an exemption and its violation. Neither the mandate of the " Court of Appeals nor the judgment of the Jefferson Circuit " Court states the ground for holding the ordinance " void. It is said that some thirty days before the decision of " the prohibition case by the Court of Appeals that court, in " Levi vs. City of Louisville, 97 Ky., 394; 30 S. W., 973, held " that the City of Louisville had no power under the constitu- " tion to substitute a license tax for *ad-valorem* tax on personal " property, and that this ruling must have led to overruling the " demurrer to the petition in the prohibition suit, because it " necessarily rendered the license tax upon the banks void. " The Levi case was a suit by an owner of real estate to enjoin " the collection of an *ad-valorem* tax on his land, on the ground " that the city had not imposed such a tax on personalty, but " had substituted therefor a license tax upon it, and so had " discriminated in favor of personal property and against realty. " The Court of Appeals held that it was the duty of the city to " impose an *ad-valorem* tax on personalty, and that it could only " impose a license tax on a business in addition to an *ad-valorem* " tax on property. We confess, we can not see how this decision " would have determined the question at issue between the com- " plainant bank and the City of Louisville, in the prohibition " suit. There was nothing in the petition for prohibition to " show that the license tax was a substitute for an *ad-valorem* " tax upon the personal property of the bank. There was noth- " ing to show that the city of Louisville had not, under the " revenue act of 1892, assessed an *ad-valorem* tax on the bank's " personalty. The license tax was graduated by a percentage, " not of the bank's personal property, but of the bank's gross " receipts, and did not, therefore, purport to be a taxation on its " personal property. The petition was not therefore, demurra- " ble under the Levi case. When we further consider that the

"sole ground stated in the petition for a prohibition was that "the license tax was void, because it impaired the bank's con- "tract of exemption, and so violated the Constitution of the "United States, and we find that this was the sole ground con- "sidered by the Court of Appeals in its opinion, we can have no "doubt what was the point adjudged" (88 Fed. R., 394 &c).

There seems so little real ground to contend for the reverse of this proposition that it would seem to be the work of supererogation to say anything further on the subject.

It results therefore, we submit, that the judgment of the Circuit Court must be affirmed in cases No. 360 and No. 361 (Stone, etc., vs. Louisville Banking Company, and Louisville vs. same) in which it perpetually enjoined the assessment or collection of any tax against the Louisville Banking Company other than as prescribed by the Hewitt act for any of the years involved. Because it was an actual party of record in the former litigation and its "corporate existence" (during which the contract under the Hewitt act continues) was the same, without even the necessity of an extension of its charter, during all the years in controversy.

It necessarily results further that the judgment of the Circuit Court must be affirmed in case No. 364 (City of Louisville vs. Third National Bank) in which it perpetually enjoined the collection of any tax for the years 1893 or 1894 against the Third National Bank. Because it was also a party of record to the former litigation; and the original term of its charter, its "corporate existence," would have continued, even without any extension, to August, 1894, a period subsequent to the accrual of the tax of 1894.

As to whether or not its corporate existence continued unchanged after the extension of the term of its charter, so as to continue the contract with the State during the extended term, is a question we will discuss hereafter, and is involved in case No. 404, Stone, etc., vs. The Third National Bank.

We now pass to the next branch of the discussion.

IV.

Does the Former Adjudication Protect Only the Banks Actually Engaged in the Litigation, or Does it Extend to the other Institutions which Entered into the Contract with the City to Abide the Result Thereof, and acted on the Faith of it?

If the City had the right, through its attorney and Mayor, or either of them, to make the contract set up in the bill, then there is no doubt about the fact that the benefit of the adjudication extends to all institutions that were intended to be bound by that contract and acted on the faith of it. Nor is there any doubt that the intention was that the contract should extend to all banks and trust companies which had accepted the provisions of the Hewitt act; for the contract expressly so stated, and it is admitted that all of the institutions named in the caption of this brief, except the First National Bank, did accept the provisions of the Hewitt act.

The circumstances under which this contract was made are detailed on pages 10 to 15 of this brief, and need not be repeated. Judge Barker, who was at that time counsel for the city, and signed the contract after full conference with the Mayor and Finance Committee of the City, testifies fully to the circumstances under which the contract was made. See record in case of Stone vs. Bank of Commerce, pages 42 to 47 inclusive. The question then presents itself,

DID THE CITY HAVE A RIGHT TO MAKE THE CONTRACT?

Counsel for the City denies the right of the Mayor, the City Attorney and the Sinking Fund Commissioners to enter into the kind of stipulation made in this case with the banks and trust companies. We have already shown why that stipulation was made, and that it was most distinctly made at the instance of, and for the benefit of, the City itself. And it is alleged in the bills, and will be admitted, that by reason of that stipulation the City now has in its treasury over $150,000 which it could not otherwise have collected, and not one cent of which would it have ever received.

The City, therefore, has in its treasury about $150,000 which it gained wholly and entirely as the result of this agreement. For it now, therefore, to undertake to repudiate its agreement while still holding the benefit, or even to undertake to repudiate the agreement and surrender the benefit, because it has become its

interest to do so, is repugnant to conscience, and will not be tolerated by a court of equity. The facts in relation to this matter are alleged in the bill, and whether the City is estopped by a former adjudication or merely *in pais*, it is equally estopped from attempting to collect taxes from the complainants except according to the method pointed out by the Hewitt bill. We maintain that it is estopped both by the former adjudication and *in pais*. Herman on Estoppel, page 150, thus states the doctrine of *res adjudicata* as applied to privies made so by an agreement to abide the result of a pending litigation:

"A man becomes a privy whenever he agrees to be bound "by the acts of a third person; and where one agrees to be "bound by the result of a judicial proceeding, as against a "stranger or third person, under such circumstances that others "have the right to insist on the fulfillment of his agreement, "he will not be permitted to recede from his promise after the "rendition of the judgment, to their injury."

See, also, Brown vs. Sprague, 5 Denio, 545, and Patten vs. Caldwell, 1 Dall., 442.

There is no principle of the doctrine of *res adjudicata* better settled than that the estoppel must be mutual, and if the institutions, parties to that agreement, are estopped by the judgment to re-litigate the questions, it necessarily follows the City is estopped; and the authority quoted from Herman is direct to the effect that these banks and trust companies, after having made this agreement have made themselves privies, and are estopped by the judgment as such, as completely as the original parties are estopped.

But the city is unquestionably estopped by its conduct, even if the banks and trust companies are not able to plead technically *res adjudicata*. That the city may thus be estopped is clear from the recent opinion of this Court in the case of the City Railway Company vs. the Citizens' Street Railroad Company, 166 U. S., 566. Of course, it can not be denied that *the city* possessed the power to make such an agreement, and that is not questioned, but we understand the position of counsel to be that the *Mayor* and the *City Attorney* had no right to make the contract. If it be assumed, as it must be, that the city had the power to make such an arrangement, then it is estopped after having received the benefit of the agreement to question it upon the ground of lack of formality in its execution.

In the case referred to this Court said:

"All that is necessary to create an estoppel *in pais* is to show "that upon the faith of a certain action on the part of the city, "which it had power to take, the company incurred a new lia- "bility; as, for example, by the negotiation of a new loan, and

" the issue of a new bond and mortgage to secure the same. " Under such circumstances, justice to the bondholders, who " have in good faith invested their money in reliance upon the " validity of such action, demands that the city shall be held to " its contract, notwithstanding there may have been originally " no consideration to support it."

In the case at bar, as we have shown, the contract was made in the interest of, and for the benefit of, the city ; and the consideration which the city has received is over $150,000. Under such circumstances there can be no question, it seems to us, that the city is equitably estopped to now attempt to tax the banks and trust companies otherwise than as indicated by the Hewitt act.

But we maintain that the Mayor and City Attorney, or even the City Attorney alone, under the circumstances as they actually existed, had the power to make the stipulation pleaded in these cases. We do not see how it can be contended with any show of reason that such an agreement requires an ordinance of the General Council ; we have certainly found no statute upon which such a contention can be based ; and the counsel for the city did not claim in his argument at the bar that there was such a statute.

By section 2791, which is applicable to the city of Louisville, the duties to be performed by the Mayor are prescribed. Among others is the duty to be vigilant and active in causing ordinances of the city and the laws of the State to be executed and enforced.

By section 2793 it is declared (referring to the Mayor):

" He shall exercise a general supervision over all the execu- " tive and ministerial officers of the city and see that their offi- " cial duties are honestly performed."

By section 2909, which relates to the duties of the Attorney for the City of Louisville, it is declared :

" There shall be elected by the General Council immediately " upon the assembling of the new Board a City Attorney, whose " duty it shall be to give legal advice to the Mayor and the mem- " bers of the General Council, and all other officers and Boards " of the city in the discharge of their official duties. If " requested, he shall give his opinions in writing, and they shall " be preserved for reference. It shall also be his duty to prose- " cute and defend all suits for and against the city, and to attend " to such other legal business as may be prescribed by the Gen- " eral Council."

Here, by the very terms of the statute creating his office, he alone is given charge of the litigation of the city ; and it was, it

seems to us, a most proper and necessary step, in view of the litigation which was then pending, or about to be brought, that the attorney should agree with the counsel for the banks and trust in reference to the bringing of such suits as would illustrate the different phases of the question as applied to the different institutions, and stipulate that a judgment in these test cases should be binding upon all for whom the test cases were made. Take the present situation. There were filed, at one time, for banks and trust companies, in the city of Louisville, thirty cases. It would not take over four or five of these cases to illustrate every phase of the question which can be raised in every one of them. Can it be, then, that the attorney for the city must prepare every one of these cases and call upon the court to read the record in every one of them, when the judgment of the Court as applied to each can be obtained by the preparation of only a few? Why go to this unnecessary cost? It seems to us a very proper step for the City Attorney to take, and one that ought to be commended.

In the third American and English Encyclopedia of Law, second edition, 353, under the head of "Attorney and Client," it is stated:

> "Subject to the rule that an attorney can not compromise "his client's case, any agreement or stipulation which appears "in the progress of a cause to be necessary or expedient for "the advancement of his client's interests may be made for his "client by an attorney; and this right, it seems, is exclusive so "far as it applies to stipulations relating purely to the manage-"ment of the case in court."

The stipulation here did relate to the management of the litigation. The question which the attorney had to consider was this: Was it proper to subject the city to the cost of twenty-five or thirty cases when every phase of the question could be determined upon presenting two or three of them? Again, was it right for him as the attorney for the city to insist upon all of the cases being brought, when the result would be that the city would collect no taxes at all from the banks for a year or two? Under these circumstances the attorney, in order that the city might realize the taxes, as heretofore shown, from the banks and trust companies not parties to the test cases, made the stipulation in the interest of his client.

It is again stated, in the same work, in the very next section:

> "Thus an attorney employed in several different suits by or "against different parties, but all involving the same issues, and "the interest of his client being of the same character in all, "may stipulate that the trial of one shall determine the issues "in all the others."

In support of these propositions a great many cases are cited. In support of the last proposition there are cited: Ohlquest vs. Farwell, 71 Iowa, 231 (S. C. 32, N. W. Rep., 277); Scarritt Furniture Co. vs. Moser, 48 Mo. App., 543; Eidan vs. Finnegan, 48 Mo., 33 (S. C. 50 N. W. Rep., 933). These cases as well as those cited upon the other propositions amply support the text.

See also on the general authority of an attorney in the conduct of the case and his right to make stipulations with reference to one case abiding the result of the others, sections 190, 191, 192, 193, 194 and 195 of first volume of Thompson on Trials. See also the cases of North Missouri Railroad Co. vs. Stephens, 36 Mo., 150; Gilmore vs. American Central Ins. Co., 67 Cal., 366. The same doctrine is recognized in Lawson's Rights, Remedies and Practice, section 173.

The position that the City Attorney had the right to make the contract was sustained by the Circuit Court after a most painstaking investigation. The Court, in treating of this branch of the question, said:

"We are of opinion that the City Attorney was vested with "ample authority to bind the City of Louisville to the contract "mentioned in so far as it affected the complainant herein. By "section 2909 of the Revised Statutes of Kentucky it is pro-"vided that:

"'There shall be elected by the General Council, immedi-"'ately upon the assembling of the new board, a city attorney, "'whose duty it shall be to give legal advice to the Mayor and "'members of the General Council, and all other officers and "'boards of the city in the discharge of their official duties. "'If requested, he shall give his opinions in writing and they "'shall be preserved for reference. It shall also be his duty to "'prosecute and defend all suits for and against the city, and "'to attend to such other legal business as may be prescribed "'by the General Council.'

"The foregoing section makes this officer the retained "attorney of the city in every suit brought against it. The "question at issue between the banks and the City of Louis-"ville was whether the city could collect license taxes under "one of its ordinances. The banks notified the City Attorney "and the Commissioners of the Sinking Fund, whose duty it was "to receive the money for the benefit of the city, that they in-"tended to resist the collection of the tax by litigation. It "was the duty of the City Attorney, under the statute above "set forth, to take charge of the litigation thus about to be "brought. It was his duty, as the attorney of the city, to save, "so far as he could without prejudice to the city's interests, costs "which might be accumulated should suits to the number of "twenty be brought and won by the banks against the city.

"It seems plain to us that it was within his general authority as "attorney to make an arrangement with the intended litigants, "by which the litigation to be brought should be reduced in "volume to as few cases as possible by means of a stipulation "that all the suits involving the same questions should abide the "result in one suit to be brought. We think that such a stipu- "lation was a mere step in the management of the litigation, "and was entirely under the control of the attorney retained for "the suits. It did not work to the prejudice of the city in the "slightest. Had the suits actually been brought, a stipulation "between the city attorney and the attorneys for the banks of "this character would have been clearly part of the ordinary "management of the suits as any other arrangement for expe- "diting their trial. No material distinction can be suggested "between the power of the city attorney to make an agreement "of this character with respect to intended suits and suits actu- "ally filed. The control that an attorney has by virtue of his "office over the suit in which he is employed is very wide in "respect to those matters that relate to the progress of the suit "and the mode of reaching a conclusion, and which do not "deprive the client of a full opportunity to be heard by his "attorney on the issues raised in the case. Such authority "inheres in the relation between an attorney and client in re- "spect to litigation, and the authorities fully sustain this con- "clusion.

"In Railroad Co. vs. Stephens, 36 Mo., 150, the plaintiff rail- "road company brought several suits against different stock- "holders in which the questions were precisely the same. The "attorneys for the respective parties entered into a written "agreement stating that, as the same facts arose in all the cases, "they would abide by the judgment that should be rendered in "one of them, and that a like judgment should be rendered in "each of the several cases. It was contended in that case that "the attorneys who made the agreement had no authority to "make the agreement, and that it was void. The court sus- "tained the agreement as within the authority of the attorney. "It said:

"'The agreement in this case is not a "compromise" accord- "'ing to the usual acceptation of that term, for that generally "'applies to releasing the part of the debt, taking land instead "'of money, or changing the nature and character of the thing "'to be recovered. It comes nearer within the general manage- "'ment of the case.'

"In Ohlquest vs. Farwell, 71 Iowa, 231; 32 N. W., 277, a "client was a party to two suits involving substantially the "same question. It was held competent for his attorney to "bind him by an agreement that only one of the cases should

"be tried, and that the judgment resulting from such trial should "determine the kind of judgment to be entered in the other "case. In delivering the opinion of the court, Judge Beck said:

"'It is undoubtedly true that an attorney can not consent to "'a judgment against his client, or waive any cause of action "'or defense in the case; neither can he settle or compromise "'it without special authority. But he is, by his general em- "'ployment, authorized to do all acts necessary or incidental to "'the prosecution or defense which pertain to the remedy pur- "'sued. The choice of proceedings, the manner of trial, and "'the like, are all within the sphere of his general authority, "'and, as to these matters, his client is bound by his action. "'These rules are conceded by counsel in this case. It can not "'be doubted that, under them, counsel for parties in several "'suits, involving the same issues, may, in the exercise of their "'general authority, consent to the consolidation of all for trial, "'or stipulate that the trial of one shall determine the others. "'This pertains to the remedy pursued—to the manner of trial— "'and it is not an agreement for judgment or a compromise. "'The parties are not deprived of a trial, nor is judgment ren- "'dered by consent. The counsel simply assent to a trial in a "'particular manner; that one trial shall settle the same issues "'in several cases. This is just what was done by the counsel "'for Becker in this case. The form of agreement is that judg- "'ment in his case should follow a trial in another action. "'This is not an agreement for a judgment, but in effect an "'agreement for a manner of trial.'

"See, also, Eidan vs. Finnegan, 48 Minn., 53; 50 N. W., 933; "Gilmore vs. Insurance Co., 67 Cal., 366; 7 Pac., 787."

"In Thompson on Trials (Volume 1, Sec. 195,) the author "says:

"'Where several cases are pending in Court, depending "'upon the same facts or questions of law, it is competent for "'the attorneys, in virtue of their general retainers, to stipulate "'that only one shall be tried, and that the others shall abide "'the result of that one'."

"We think, therefore, that, in so far as the issues arising "between the banks not actually engaged in the litigation and "the City of Louisville were the same as in the three suits "which were brought as test cases, the contract made by the "City Attorney was binding upon the city" (88 Fed. R., 403, &c).

The Court then proceeds to consider the question whether the contract made enables the parties to it to claim the benefit of the estoppel of the judgments thereafter rendered, and reaches the conclusion that it does. In this discussion the opinion of the

Court is so clear that, in lieu of an argument, we quote from it as fully covering the question.

"The next question is whether the contract made enables "the complainant bank to claim the benefit of the estoppel of "the judgments thereafter rendered. We think it does. In "Batton vs. Caldwell, reported in 1 Dall., 419, the action was on "a policy of insurance. Counsel for plaintiff offered to read in "evidence a special verdict that had been given in another "action against a different underwriter. This was objected to "on the ground that the verdict was given between other "parties, and therefore not admissible, upon which an agree- "ment of all the underwriters to be bound by one verdict was "proven. McKean, C. J., said:

"'The defendant had no opportunity of cross-examining "'upon the former trial, and the answer is that he, with the "'rest of the underwriters, had agreed to be bound by one ver- "'dict, which is certainly the only ground for offering the "'evidence proposed by the plaintiff's counsel. Whether this "'agreement was made in person, or by a broker mutually em- "'ployed, it is equally binding on the parties; and under the "'agreement, all the underwriters were fully entitled to inter- "'fere upon the former trial, and to cross-examine the witnesses "'then produced. Although, therefore, we should not have "'allowed the special verdict to be read, without full proof of "'the agreement, yet, on receiving that satisfaction, we think "'it would be unfair to suppress it; and, for the future, we "'desire that all such agreements may be entered on the records "'of the Court.'

"The Court then held that the verdict thus offered was not "conclusive. As the latter proposition, however, is in conflict "with the rule laid down by the Supreme Court of the United "States in a recent case of Southern Pac. R. Co. vs. U. S., 168; "U. S., 1; 18 Sup. Ct., 18, that part of the decision can not be "regarded as authority here.

"In Brown vs. Sprague, 5 Denio, 545, several ejectments "were pending between one claiming title and persons having "only the naked possession of the lands. An agreement was "made between all the parties that the suits should be stayed "and await the event of a suit between other parties in which "the same questions arose. It was held that a judgment in that "suit would operate as an estoppel between the parties to the "agreement.

"Mr. Freeman, in his work on Judgments, says (Section "174):

"'Neither the benefit of judgments, on the one side, nor the "'obligations, on the other, are limited exclusively to parties "'and their privies. Or, in other words, there is a numerous

"'and important class of persons who, being neither parties upon "'the record, nor acquirers of interest from those parties after "'the commencement of the suit, are, nevertheless, bound by "'the judgment. Prominent among these are persons on whose "'behalf and under whose direction the suit is prosecuted or "'defended in the name of some other person. * * * The fact "'that an action is prosecuted in the names of nominal parties "'can not divest the case of its real character, but the issues "'made by the real parties, and the actual interests involved, "'must determine what persons are precluded from again "'agitating the question, and who are estopped by the "'previous decision. Whenever one has an interest in the "'prosecution or defense of an action, and he, in the advance-"'ment or protection of such interest, openly takes substan-"'tial control of such prosecution or defense, the judgment, "'when recovered therein, is conclusive for and against him "'to the same extent as if he were the nominal as well as the "'real party to the action. * * * Where one seeks the benefit "'of an estoppel by judgment, on the ground that he was the "'real party in interest in an action, he must show that he con-"'ducted the action or defense openly, to the knowledge of the "'adverse party, and for the protection of his own interests.'"

"These principles are sustained by the cases cited by the "learned author. See Cole vs. Favorite, 69 Ill., 457; Wood vs. "Ensel, 63 Mo., 193; Tate's Ex'rs. vs. Hunter, 3 Strob. Eq., "136-140; Palmer vs. Hayes, 112 Ind., 289; 13 N. E., 882; Gill "vs. U. S., 7 Ct. Cl., 522, 526. See also, Herm. Estop., Sec. 139.

"In 1 Greenl. Ev., Sec. 523, the principle is stated as follows:

"'But, to give full effect to the principle by which parties "'are held bound by a judgment, all persons who are repre-"'sented by the parties, and claim under them or in privity "'with them, are equally concluded by the same proceedings. "'We have already seen that the term 'privity' denotes mutual "'or successive relationship to the same rights of property. "'The ground, therefore, upon which persons standing in this "'relation to the litigating party, are bound by the proceedings "'to which he was a party, is that they are identified with them "'in interest; and, wherever this identity is found to exist, all "'are alike concluded. Hence all privies, whether in estate, in "'blood, or in law, are estopped from litigating that which is "'conclusive upon them with whom they are in privity. And "'if one covenants for the results or consequences of a suit "'between others, as if he covenants that a certain mortgage "'assigned by him shall produce a specified sum, he thereby "'connects himself in privity with the proceedings, and the "'record of the judgment in that suit will be conclusive evi-"'dence against him.'

"In the case of Rapelye vs. Prince, 4 Hill, 119, Mr. Justice "Bronson, speaking for the Supreme Court of New York, said:

"'When one covenants for the results or consequences of a "'suit between other parties, the decree or judgment in such "suit is evidence against him, although he was not a party.'

"In the present case there can be no doubt from an exami- "nation of the contract and the averments of the bill that the "three suits which were conducted were openly conducted in "the interest of all the parties to the agreement with the knowl- "edge and by the consent of the City of Louisville, and that the "counsel who appeared for the parties to the records were at "the same time discharging their duties as counsel for the other "banks who had made the agreement. If any one can be boun "by a judgment to which he is not a party, it would seem that "the banks here must have been so bound. Had the result "gone the other way, and a judgment been rendered in favor of "the City of Louisville in the cases referred to, it can not admit "of doubt that all the banks would have been bound by the "decision. As part of the consideration for the settlement of "the litigation in the manner fixed by the agreement, the banks "paid to the Sinking Fund Commissioners for the City of Louis- "ville the substantial sum of $150,000. Had the agreement "not been entered into, it is certain that the complainant would "have obtained formal judgment in a prohibition suit, and "would now have been in the same position as the Louisville "Banking Company. Relying on the binding character of the "agreement, however, judgment was not taken in the name of "complainant. Equity and justice require that effect should "be given to an agreement upon the faith of which $150,000 was "immediately paid to the City, and a formal judgment was not "taken. It is just that, inasmuch as the banks would have been "bound by a diverse judgment, they shall have the benefit of a "judgment which was rendered in favor of their colleagues "selected to represent them in the suit" (88 Fed. R., 405, &c).

If we are correct in the position taken by us in this division of our brief, to-wit, that the banks which agreed with the city to abide the result of the test cases are entitled to the protection of the adjudication therein made, then it follows that the judgment of the Circuit Court in the cases of Stone, &c., vs. Bank of Commerce, No. 362, and City of Louisville vs. Bank of Commerce, No. 363, in which the court enjoined the assessment or collection of any taxes against the Bank of Commerce, other than as provided in the Hewitt act, must be affirmed. For that bank was a party to the agreement mentioned; and its corporate existence during all of the years involved was exactly the same as when the Hewitt act was passed, there not having been any necessity even for an extension of the charter.

It must also result that the judgment of the Circuit Court in the case of City of Louisville vs. Citizens National Bank, No. 365, must be affirmed, in which the Court enjoined the collection of any taxes for the years 1893 and 1894 against the Citizens National Bank, other than as provided for by the Hewitt act. For that bank also was a party to the agreement with the City of Louisville; and the term of its charter as originally granted would not have expired until August, 1894, which was a date subsequent to the accrual of the taxes of 1894.

Whether or not the corporate existence of the Citizens National Bank was the same during the extended term of its corporate existence, so as to give it the benefit of its contract with the State during this extended term, is a question which we will hereafter discuss, and which is involved in the case of Citizens National Bank vs. Stone, &c., No. 405.

V.

Have the Trust Companies an Equal Right with the Banks to Avail Themselves of the Plea of Res Adjudicata?

The Circuit Court held that they had not.

First. Because the difference between a trust company and a bank was such that the city attorney had no right to make the agreement extend to trust companies, as the test cases were made entirely in the names of the banks.

Second. Because, irrespective of the city attorney's power, the point adjudged being that banks which had accepted the provisions of the Hewitt act had an irrepealable contract, that adjudication could not be made to extend to or protect the trust company, which was not a bank.

These questions, though stated as two distinct questions, are yet so interdependent that a discussion of either will necessarily almost entirely cover the other, and we shall therefore consider them together.

The important question to be considered is whether it was intended by the statute relied upon by each institution as the basis of its contract, to make any distinction between banks and trust companies. If it was not, then we submit that the only remaining question is whether the legislature possessed the power to make such a contract with the trust companies; for, if the legislature possessed the power, and intended to treat banks and trust companies exactly alike, no reason is perceived, assuming the power of the city, by its attorney or otherwise, to make the contract with *banks* for a test case, why the contract should not be extended to *trust companies*, which, for the purpose of taxation, stood exactly in the same situation as banks.

It will not be denied that it was the intention of the contract with the city to include trust companies, and that on the faith of the contract the trust companies actually carried out the contract.

With reference to the first of these propositions, the contract itself, after dividing the banks into classes "A," "B," and "C," declares: "It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall into class 'B,' above named." (Louisville Trust Company, Record, page 14.) And the attorney for the city, Judge Barker, speaking of this question in his deposition in these cases, and of the view taken by the attorneys for both sides, said: "When this conference of February 13, 1894, was held we were brought face to face with the fact that all the banks and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior

to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856, and the National Banks, and it was supposed by counsel that the trust companies went into the class of the State banks, whose charters had been granted subsequent to the act of 1856." (Stone, &c., vs. Bank of Commerce, p. 44.)

Again this question was asked Judge Barker:

Q. If this arrangement had not been made as indicated in the resolution, a copy of which you have referred to, were you given to understand that each one of these institutions would refuse to pay anything and bring its separate suit?

A. "Undoubtedly, I was given so to understand, and that result would have been unavoidable, as I would have taken out an ordinance warrant against each one of them, which would have forced them into the Police Court, and they would have been bound to have defended as many suits as there were institutions delinquent. Now, to save all this, the agreement in regard to the classes was made." (Stone vs. Bank of Commerce, p. 44.)

On the other question, viz., whether the contract was carried out by the trust companies, Judge Barker testifies that it was carried out to the letter. (Stone vs. Bank of Commerce, p. 46.)

DID THE STATUTE INTEND TO MAKE ANY DISTINCTION BETWEEN TRUST COMPANIES AND BANKS?

The first section of Article 2 of the Hewitt Act (Appendix) settles this question beyond dispute. The language shows it was not intended to apply to banks alone, nor to make of them a distinct class. The language is that "shares of stock in State and National Banks, *and* other institutions of loan or discount, *and* in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, *institutions, and corporations* shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal.

It thus appears that the institutions to be so taxed and put in the same class are designated in three ways:

A. Banks.

B. Institutions of loan or discount.

C. Institutions required by law to be taxed on their capital stock.

In the amended bill filed by the Fidelity Trust & Safety Vault Company it is alleged that "the complainant, Fidelity Trust & Safety Vault Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loan or discount and to all corporations required by law to be taxed on their capital stock. And your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed, and has always been taxed, on its capital stock." (Fidelity Trust Co. vs. Louisville, p. 27.)

Again in the same pleading it is alleged, "Your orator says that at the time it entered into the contract with the City of Louisville to abide the result of the decision in the case of the Louisville Banking Company vs. R. H. Thompson and the City of Louisville, it and the city and the counsel for said city, all in good faith, believed that the decision of that case would settle every question which could be raised either by it or the City of Louisville, and your orator shows that at that time the case of the Louisville Trust Company vs. City of Louisville had not been decided." (Same record and page.)

The same pleading sets up some amendments to the charter, with the view of showing the powers possessed by it similar to those possessed by banks. The language of the pleading in this respect is as follows:

"Your orator further shows that, by an amendment to its "charter adopted by the General Assembly of the Common- "wealth of Kentucky and approved April 12, 1888, it was pro- "vided as follows:

"'Section 1. That the charter of the Fidelity Trust & "'Safety Vault Company, of Louisville, Kentucky, be and the "'same is so amended that promissory notes payable to any "'person or persons, or to a corporation, and payable and nego- "'tiable at the office of said company, in Louisville, Kentucky, "'which shall be endorsed to and discounted by any bank "'incorporated under any law of this Commonwealth, or organ- "'ized in this Commonwealth under any law of the United "'States, shall be and they are hereby placed on the same foot- "'ing as foreign bills of exchange.'

"And by an amendment adopted the 15th day of May, "1890, it was provided as follows:

"'Section 2. That said company may receive money on "'deposit subject to check or payable at an agreed time.

"'Section 3. That all promissory notes, secured by lien on "'real estate or collateral, made negotiable and payable at a "'chartered bank or at the office of said company, shall, when

" ' endorsed to, and purchased by said company, be placed on
" ' the footing of foreign bills of exchange.'
" Your orator further shows that since the adoption of
" said amendment it has regularly done a savings bank business,
" and has received deposits and paid interest on the same, in
" every respect doing the same character of business as done by
" the Louisville Trust Company, under its power to do a savings
" bank business; and your orator submits that, for the purposes
" of taxation, and so far as the performance of a public service
" is concerned, it should be deemed and treated as a bank."
(Same record, p. 28.)

In the amendment filed by the Louisville Trust Company it is alleged that "the complainant, The Louisville Trust Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks *and* other institutions of loan or discount *and* to all corporations required by law to be taxed on their capital stock; and your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed, and has always been taxed, on it capital stock."

Again, in the same pleading, it is alleged as follows:

" Your orator further says that at the time it entered into
" the contract with the City of Louisville to abide the result of
" the decision in the case of the Louisville Banking Company
" vs. R. H. Thompson and the City of Louisville, it and the
" city and the counsel for said city, all in good faith, believed
" that the decision of that case would settle every question
" which could be raised either by it or the City of Louisville,
" and your orator shows that at that time the case of the Louis-
" ville Trust Company vs. City of Louisville had not been
" decided."

The same pleading sets up the amendments to its charters granting it banking privileges as follows:

" Your orator further shows that by an amendment to its
" charter, adopted by the General Assembly of the Common-
" wealth of Kentucky, and approved May 15, 1886, it was ex-
" pressly provided by sections 5, 6 and 7 as follows:
" ' Section 5. *For purposes of taxation this company shall be*
" ' *classed and treated as one of the banks of this State*, and shall be
" ' subject to and pay the same rate of taxes, to same parties, at
" ' same time, in same manner and for the same purposes only,

" ' as may be provided by law from time to time as the banks
" ' doing business in this State.

" ' Section 6. The said company, in the prosecution of its
" ' business as provided in its charter, shall have power to buy
" ' and sell notes secured by lien on real estate, also to loan
" ' money and take such notes in pledge as security for such
" ' loan; and all such notes bought by or pledged to said com-
" ' pany as would be placed on same footing as foreign bills of
" ' exchange, if discounted by any of the banks of this State,
" ' shall be, and they are hereby, placed on same footing as for-
" ' eign bills of exchange, provided said notes are given in fulfill-
" ' ment of contracts that have been fully executed at the time
" ' of such purchase or pledge.

" ' Section 7. Said company is hereby authorized to establish
" ' a "savings department" in connection with its business, and
" ' carry on business in such departments as a savings bank, and
" ' shall receive on deposit, during business hours, any sum not
" ' less than one dollar, and shall allow interest on same at such
" ' rate as may be fixed by the by-laws, not exceeding four per
" ' cent. per annum. The business of this department shall be
" ' kept distinct and separate from the other business of the
" ' company, and in a separate set of books. All sums deposited
" ' in the savings department by a workingman, married woman
" ' or infant, shall be, and they are hereby, exempted from tax-
" ' ation of any kind whatever, but the sum so exempted from
" ' taxation shall not exceed the sum of $500. Married women
" ' and infants may make deposits in this department in their
" ' own names, and withdraw same as if of full age or unmar-
" ' ried.'

" And your orator shows that from and after the adoption of
" said amendment to its charter, which was just two days before
" the adoption of the Hewitt law, it did, and still does, a sav-
" ings bank business, and is for all purposes of taxation, and so
" far as the performance of a public service is concerned, a bank,
" and it is respectfully submitted that it should be so deemed
" and treated." (Record Louisville Trust Co., No. 409, p. 31.)

This amendment was adopted just two days before the adoption of the Hewitt act, so it must be treated as practically a part of the Hewitt act, and the two must be construed together. Henderson vs. Lambert, 8 Bush 609.

We think we have shown quite clearly that the Legislature did not mean to make any discrimination between the corporations mentioned in the provision of the Hewitt act quoted, but meant to put them all in one class, and to treat them exactly alike. We think we have also shown that the trust companies necessarily come within the classes mentioned, it being conceded by the

demurrer both that they are companies of loan, and that they are companies which, under the law, were compelled to pay taxes upon their stock.

DID THE LEGISLATURE HAVE POWER TO CONTRACT WITH TRUST COMPANIES?

We are now brought to the consideration of the second branch of the question, viz., as to the power of the Legislature to make such a contract with the trust companies.

The Circuit Court, in considering this question, seems to hold that because Judge Grace, in the course of his opinion in the case of the Louisville Trust Company vs. City of Louisville, 30 Southwestern Rep., 991, expressed the view that the Trust Company was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, necessarily required or at least justified that court in limiting the power of the attorney for the city to extend the contract heretofore spoken of to trust companies, or, in other words, that the City Attorney had not the right to agree with the trust companies, that the case of the Louisville Banking Company should be a test case for the trust companies, there being that difference between the two suggested by this opinion of Judge Grace's.

We most respectfully suggest that the Circuit Court in so holding, in the first place, missed the spirit of the Hewitt act entirely in assuming that that act was passed in recognition of any public service performed by any of the companies coming within its purview. We shall discuss this question a little later; for the present, we desire to call the Court's attention to the fact that this statement by Judge Grace was not a decision, but was a pure dictum. This appears conclusively from the fact that the attempt in that case to hold the Louisville Trust Company liable to taxes was under the Hewitt act itself, and the court held it liable under the Hewitt act. There was no attempt to hold it otherwise than under the authority of the Hewitt act, and it was not contended that the Hewitt act did not apply to trust companies. On the other hand, as clearly shown by the opinion, the City of Louisville was claiming, not the right to tax all of the property of the trust companies in the city, but the right to tax the buildings in which they did business, which was pointed out by the Court of Appeals to be clearly authorized by the proviso contained in the seventh section of the Hewitt bill. The question involved was one of construction, and the tax was actually collected under the authority of the Hewitt act, and was not levied as it might have been levied if the Hewitt act did not apply to trust companies, but was levied in recognition of the application of the

Hewitt act to the Trust Companies. After the Court had so decided and enforced the tax under the Hewitt act, the opinion proceeds:

> "We are not impressed with the equity of the act of the Leg-
> "islature in declaring that this corporation should be classed as
> "one of the banks of the State for the purposes of taxation.
> "It is not a bank, and it was by express provisions of its
> "charter declared that nothing contained in it should authorize
> "it to do a banking business, and this restriction has never
> "been removed. Whatever may have been the considerations
> "of public policy that induced the Legislature ever in Ken-
> "tucky to adopt a different rate of taxation for banks to that
> "applied to private individuals and to other corporations
> "(which has always been of questionable propriety) they did
> "not apply to appellant in any just and fair sense. But as the
> "City of Louisville is not complaining of any restriction of
> "this right of taxation, but is only attempting to tax as author-
> "ized under the Hewitt law, there is no question raised by the
> "city claiming any other right."

Here is not only a statement of the Court of Appeals that the Legislature did not mean to make a distinction between trust companies and banks, but there is the further distinct statement that the city was not complaining of any restriction of this right of taxation, but was only attempting to tax as authorized under the Hewitt law, which clearly shows that this expression of opinion or of doubt as to the propriety of classifying trust companies with banks was pure dictum.

We therefore submit that this dictum ought not in the slightest to have influenced the Circuit Court, and ought not to influence this Court, because if the rendition of public service is necessary to such a contract, then the trust companies do render a public service quite as much as the banks. It cannot be said that the public service rendered by the banks was the issuing of circulating notes by the banks, because at the time this act was passed, and for a long time before that, none of the State banks had availed themselves of their power to issue circulating notes, and it was known to all of the Legislature that they probably never would, because of the act of Congress levying the tax of ten per cent.

But, furthermore, we do not believe that a considerable proportion of the State banks in the State at the time this Hewitt act was passed had the power to issue circulating notes. So far as the Louisville Banking Company is concerned, which, by agreement of counsel, was selected to test the right of the city to tax the trust companies, its charter *expressly forbade* its issuing of notes to circulate as money. By the twelfth section of that charter it is provided as follows:

"In no case shall this corporation exercise the business of "banking by issuing notes to circulate as money, but they may "make advances and receive in pledge for money loaned or "debts due them public and private securities, goods, wares and "merchandise."

This restriction upon its power has never been removed. If, then, we eliminate from consideration the function of issuing notes to circulate as money, there is not a substantial difference between the banks selected to test the trust companies' right and the trust companies themselves. The bank furnishes money to the public by means of discounting paper. The trust company advances money also to carry on the business of the public, but does so through a direct loan, not technically a discount. If there be any rendition of public service so far as the matter of furnishing money is concerned, it can not be possible that the law would draw such a distinction as to say that money furnished by means of discount is the rendition of public service, and money furnished by direct loan, not technically a discount, is not. The banks had the right to receive money on deposit and pay it out on checks, and so have the trust companies. And so far as we can see, the trust companies have the power to do, and actually do, everything which the Louisville Banking Company could do that might be called a rendition of public service.

Furthermore, the trust companies perform a function which the banks do not perform, and which we respectfully submit, is of itself a sufficient consideration for the State making a contract with such institutions for a commutation of their tax, and that is this: The trust companies, by their charters, have the power, and they undertake to become and to execute the duties of public administrators, executors of wills, guardians of infants, trustees of married women and committees of lunatics, assignees for the benefit of creditors, and generally to take the control and management of the estates of people *non sui juris*, and who need protection from the State as far as it can give it in the control and management of their affairs. It is an important object to the State to have some company of undoubted responsibility, with its skilled officers trained in these particular duties, to manage the estates of the infants, married women, widows and the people generally *non sui juris* of the Commonwealth, rather than to have these estates managed by inexperienced private persons, of whom it may be said that experience has taught that their appointment too frequently results in the dissipation of the estates entrusted to their charge. We suggest that these functions performed by the trust companies are just as strong, if not a stronger, justification for the State in making such a contract as that involved in this case than the mere furnishing of money to carry on the business of the Commonwealth or of the country.

We confess ourselves incapable of clearly comprehending what is meant by this general term of public service, and what comes within it, and what does not come within it. The field seems to be too vague and too cloudy for any clear perception or understanding of it. The principle does not seem to be bound by any rules, nor is there any guide to go by in ascertaining what service may be said to be a public service and what is not. Thus it has been held that a grist mill performs a public service because it is the means of furnishing food to the people; but that can not be any more a public service than the man performs who raises the grain to be ground, or than is performed by the shoemaker, or the clothier, or indeed than is performed by any person or corporation engaged in a pursuit upon which the public may be said to in any measure depend.

PUBLIC SERVICE WAS NOT THE CONSIDERATION FOR THE CONTRACT.

But we respectfully submit that the consideration for this contract was not the rendition of public service by any of the corporations coming within the purview of the act, but this contract was made in the exercise of the clear power of the State, recognized under the Constitution of Kentucky in force at the date of the act, and often in different forms of expression recognized not only by this Court, but by nearly every court of last resort in the Union, viz., the right of *classification of the subjects of taxation*, and in the exercise of a public policy of which the Legislature of Kentucky was the exclusive judge.

Up to the date of the passage of this act known as the Hewitt act, institutions similar to those involved in this litigation never paid any local taxes at all. They paid a specific tax on each share of stock to the State of Kentucky, which was in lieu of all other taxes of all kinds, and the statutes in force limiting the tax to fifty cents a share had been sustained by the Court of Appeals of Kentucky. The Legislature of 1886—the general tax rate having somewhat increased, and being at that time forty-two and one-half cents on the $100—seemed to feel that fifty cents on the share of stock was not enough for the banks and other institutions of loan and discount, or which were by law required to pay on their capital stock, to pay to the State. The Legislature was also somewhat hampered by the fact that there were several old banks in the State, which claimed to have an inviolable right to discharge all of their tax burdens by the payment of fifty cents on the share of stock, and this right claimed by the banks had then been decided in their favor by the local courts and was subsequently affirmed by the Court of Appeals in the case of Franklin County Court vs. The Banks, 87 Ky., 370. The Legislature had the further matter to consider, viz., that the Court of Appeals had held

that National Banks could not be made to pay more taxes than these old banks. See the case of City National Bank vs. Paducah, 9 S. W. Rep., 218.

Under these circumstances the Legislature of Kentucky, dealing with all the institutions coming within the purview of this act located within the borders of the State of Kentucky, and not with any particular bank or institution located in any particular place in Kentucky, made a general proposition applicable to all, and that proposition is contained in the fourth section of the Hewitt act, to be found in the appendix. Now, in many places in the State, the tax required by the Hewitt act to be paid was a greater burden at that time than would have rested upon the particular bank if it had paid under the general law. There were other instances where the burden paid under the Hewitt act would be less than banks located in other places in the State would have to pay under the general law if it paid municipal taxes. Surely the State was not bound to appoint a roving commission to ascertain in which particular places the contract at that time would be more favorable to the banks, and in which particular places the contract would be less favorable to the banks than if they paid under the general law, including local taxes. But the State had the right to deal with the whole mass of these institutions within its borders, and thus dealing with them it said in substance: If you will consent to pay as provided in this act, which is nearly double as much, and in some instances more than double as much, as you would have to pay to the State under the general law, as an equivalent for this additional amount paid to the State your local taxes will be, presumptively, at least, correspondingly abated, and thus the State will accomplish its various objects, which, primarily and in importance, above all the rest secure uniformity of burden upon capital employed by institutions of loan or discount, a most desirable object to be accomplished by the State. And, second, it will relieve the State from the embarrassment and possible litigation in the future in settling the rights of the old banks chartered before the act of 1856 and of National Banks, held by the Court of Appeals to be entitled to the same rate of taxation as that fixed by the charters of the old banks.

These being the considerations which influenced the State to make this contract, we insist that neither the Legislature nor the Court of Appeals, ever for a moment, considered the question as to whether all of these institutions, or any of them, rendered a service which might be technically called a public service. *This is not an exemption from taxation, but it is a contract prescribing the method and rate of taxation.* In such cases the inquiry is not whether the consideration rendered is such as would justify an exemption, but whether the consideration is such as would support a contract; and the considerations already mentioned are ample, we submit, to support a contract.

The question as to whether the State reserved the power to retire from this contract is not the question now under discussion, for if there be no distinction in the statute between trust companies and banks, and if the State had the power to extend the contract to trust companies, then we submit that the other question, to-wit, as to whether or not the State has the power to withdraw from the contract, has become a thing adjudged; because these considerations show that the attorney for the city had the right to make the contract on the part of the city extend to the trust companies, as well as to the banks, as they stood in the same position.

In some of the States of the Union, as we are informed, corporations are required, by general law, to pay all the tax required of them to the State, and are exempt from local burdens; while other classes of property pay local taxes. We are not advised that the right to do this has ever been disputed, but it seems always to have been conceded under the right of classification possessed by the State. That this right of classification was possessed by Kentucky when the Hewitt act was passed, and certainly until the adoption of the present Constitution, does not admit of question. It was clearly stated in the City of Lexington vs. McQuillan's Heirs, 9 Dana, 513, in language which can not be mistaken, as follows:

> "When shall the tax be levied? To what amount? Shall "it be a capitation or property tax? Direct or indirect? "Ad valorem or specific? And what classes of property are the "fittest subjects of taxation? Are all questions wisely confided "by our Constitution to the discretion of the legislative depart- "ment, subject to no other limitation than that of the moral "influence of public virtue and responsibility to public opinion."

So this Court, in Pacific Express Co. vs. Seibert, 142 U. S.,339, 351, said:

> "This Court has repeatedly laid down the doctrine that "diversity of taxation, both with respect to the amount imposed "and the various species of property selected either for bearing "its burdens or for being exempt from them, is not inconsistent "with a perfect uniformity and equality of taxation in the "proper sense of those terms; and that a system which imposes "the same tax upon every species of property, irrespective of its "nature or condition or class, will be destructive of the principle "of uniformity and equality in taxation and of a just adaptation "of property to its burdens."

So, in the case of Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S., 233, 237, this Court in referring to the State's power of classification for taxation, said:

"It may, if it chooses, exempt certain classes of property "from any taxation at all, such as churches, libraries and the "property of charitable institutions. It may impose different "specific taxes upon different trades and professions, and may "vary the rates of excise upon various products; it may tax real "estate and personal property in a different manner; it may tax "visible property only, and not tax securities for payment of "money; it may allow deductions for indebtedness, or not allow "them. All such regulations, and those of like character, so "long as they proceed within reasonable limits and general "usage, are within the discretion of the State Legislature, or "the people of the State in framing their Constitution."

It would be a mere waste of time to cite the numerous other instances in which this Court has again and again recognized the right of classification for the purpose of taxation. And we conclude this part of our argument with the statement that the State possessed the power to pass this Hewitt act and to make the contract therein provided for under its general power of classifying the subjects of taxation. Whatever may be said under the new Constitution (of 1891) of that power, as construed by the Court of Appeals, that Court never questioned the existence of this right prior to the adoption of this present Constitution.

We respectfully submit, therefore, that there is every reason for including the trust companies within the contract made by the city of Louisville which the trust companies have carried out in good faith, and for giving to these companies the benefit of the plea of *res adjudicata*, just as is given to those banks which united in the agreement to abide by the result of the test cases; and no good reason exists for excluding the trust companies from this contract entered into in good faith by both parties.

If we are right in these views, then it results that the judgments of the Circuit Court in the cases of Fidelity Trust, &c., Co. vs. City of Louisville, No. 406; Fidelity Trust, &c., Co. vs. Samuel H. Stone, &c., No. 407; Louisville Trust Co. vs. City of Louisville, No. 408, and Louisville Trust Co. vs. Samuel H. Stone, &c., No. 409, must each be reversed; for each of these trust companies was a party to the agreement with the city of Louisville, by which it was agreed to abide by the result of the test cases, and in which it was expressly provided that the trust companies came within the class of institutions represented by the Louisville Banking Company; yet the Circuit Court denied to each of these Trust Companies the benefit of the plea of *res adjudicata*, and dismissed each of their bills.

VI.

Extension of National Bank Charters.

As has been heretofore shown, the Circuit Court held that the acceptance by the banks of the provisions of the Hewitt act constituted a contract; though its ruling to that effect was based upon the ground that this question as between the parties now before this court was *res adjudicata.*

Among the banks affected by this decision, and which the Circuit Court held to be entitled to the benefit of the plea of *res adjudicata*, were certain National banks; and among these National banks were two (Citizens National Bank and Third National Bank, the latter being one of the litigating banks selected under the agreement with the city), whose terms of existence had been extended under the provisions of the act of Congress of July 12th, 1882. (1 Sup. Rev. Stats., 353).

The question arose as to whether or not the contract with the State expired at what would have been the expiration of the original term of the bank's corporate existence, or whether it continued after the expiration of that period and into the period of its existence as extended.

The Circuit Court held that the contract expired on the date at which the bank's original corporate existence would have expired if it had not been extended. Accordingly, it enjoined the collection of any taxes by the city of Louisville which accrued prior to the date just mentioned, but refused to enjoin the assessment or collection of any taxes accruing subsequent to that date; and as to the latter it dismissed the bills of the complainant banks.

We submit that this was clearly erroneous.

The decision of the question involved depends simply upon the construction of the act of Congress of July 12, 1882, providing for the extension of National bank charters, and of the act of the Legislature of Kentucky which we have heretofore denominated the Hewitt act. In the present discussion we assume that the Circuit Court was right in holding that it must be accepted as true—because *res adjudicata*—that the acceptance of the Hewitt act constituted a valid, irrepealable contract between the bank and the State; and the question now under discussion becomes therefore simply a question of construction as to the *duration* of that contract.

The question is then reduced simply to this:

What was the period of duration fixed by the Hewitt act?

The Hewitt act, after setting forth the terms of the proposed scheme of taxation, and after providing how the State's proposition on this subject might be accepted by the institutions to which it was offered, then says:

"And upon such agreement and consent being delivered, "and in consideration thereof, such bank and its shares of stock "shall be exempt from all other taxation whatsoever so long as "said tax shall be paid *during the corporate existence of such "bank.*"

This certainly seems very plain, and it seems to us we are only left to consider the question as to whether "the corporate existence" of the bank with which this contract was made has ceased, or whether it still continues. If that corporate existence still continues, then it seems but a repetition of the terms of the act itself to say that the contract with the State has not yet expired. On the other hand, of course, if the corporate existence has ceased, then the contract has expired.

At the time this Hewitt act was passed, to-wit, May 17, 1886, the act of Congress of July 12, 1882, was in force authorizing the extension of National bank charters. The first section of the act, even if it stood alone and unexplained, would seem to be sufficiently clear to the effect that the extension of the term as therein provided for, was not to be the grant of a new charter or the creation of a new corporate existence, but simply an extension of the life of a corporate existence then in being. This first section provides:

"That any National Banking Association organized under "the acts of February 25, 1863, June 3, 1864, and February 14, "1880, or under sections 5133, 5134, 5135, 5136, and 5154 of "the Revised Statutes of the United States, may at any time "within two years next previous to the date of the expiration of "its corporate existence under the present law, and with the "approval of the Comptroller of the Currency, to be granted as "hereinafter provided, *extend its period of succession* by amend- "ing its articles of association for a term of not more than twenty "years from the expiration of the period of succession named in "said articles of association, and shall have succession for such "extended period, unless sooner dissolved by the act of share- "holders owning two-thirds of its stock, or unless its franchise "becomes forfeited by some violation of law, or unless hereafter "modified or repealed." (1 Sup. R. S., 353.)

But in order that there might be no possible room for doubt as to the effect of this extension, Congress added the fourth section of this statute, as follows:

"That any association so extending the period of its success- "ion shall continue to enjoy all the rights and privileges and "immunities granted, and shall continue to be subject to all "the duties, liabilities and restrictions imposed by the Revised

"Statutes of the United States and other acts having reference "to National Banking Associations, *and it shall continue to be in* "*all respects the identical association it was before the extension* "*of its period of succession.*"

This section of the statute, which, it must be remembered, was *in effect when the Hewitt act was passed*, seems to us almost so plain as to close the discussion upon the question as to what is "the corporate existence of such bank" as is covered by the Hewitt act, when that bank is a National bank. When the State made its contract with the Third National Bank, for example, the State knew that its corporate existence might cease on August 22, 1894 (it having been originally chartered on August 22, 1874), but that under the provisions of existing law this corporate existence might be continued for twenty years beyond the date just mentioned; and the State knew that the existing law provided that the bank, in the event of such extension, "shall continue to be in all respects the identical association it was before the extension of its period of succession." And, with this knowledge, the State made its contract with the bank and provided that this should continue "during the corporate existence of such bank." To say that the corporate existence of the Third National Bank, with which the State made this contract, has never ceased; that the Third National Bank which the city and State are now seeking to tax in disregard of the Hewitt act, is "in all respects the identical association" with which the contract under the Hewitt act was made, is simply to repeat the language of the act of Congress. We do not believe any character of reasoning can make this proposition any clearer than it is made by the simple statement of it.

While the question has never been decided, so far as we know, by this Court, yet it has been decided by several State courts, whose decisions stand as high as any in this land, to-wit: Those of New York, New Jersey and Connecticut.

In Trustees of First Presbyterian Church vs. National State Bank of Newark, 57 N. J. L., 27 (29 Atl. Rep. 320), there was involved the question of the duration of a contract with a national bank, which did not, by its terms, limit its duration. It was simply a continuing contract by which the bank agreed to pay certain money quarterly to the owner of an adjoining lot, if he would abstain from erecting certain obstructions thereon, which would darken the windows of the bank. The contract was made in 1872, before the passage of the act of July 12, 1882, authorizing the extension of national bank charters. At the time, therefore, of making the contract the corporate existence of the bank was limited by existing law to twenty years from the date of its original corporation, which had been August 1, 1865. The bank subsequently procured an extension of its term under the act of 1882, and subsequent to that time gave notice to the effect that it would no longer

perform the terms of the contract above recited. It was sued upon the contract, and one of its grounds of defense was "because the defendant's liability ceased with its corporate term of life, to-wit: August 1, 1885, and did not survive with the extension of its charter by the act of July, 1882." This was the defendant's second plea, and in speaking of this the Supreme Court of New Jersey said:

"The second is likewise bad, because, by the extension of its "term of being the legal identity of the defendant corporation "remained unchanged; it was not a new life that it received. It "was simply the power to continue the old life beyond the "period first fixed for its expiration.

"It is entirely settled that these acts of succession do not "have the effect of canceling the continuing obligations of the "corporation, nor can they be pleaded in repudiation of any "outstanding obligation whatsoever. Bank vs. Gay, 57 Conn., "224; 17 Atl., 555; People vs. Backus, 117 N. Y., 196; 22 N. "E., 759; Bank vs. Phelps, 97 N. Y., 44."

The foregoing case was affirmed on appeal by the Court of Errors and Appeals of New Jersey, without the delivery of any opinion. The announcement "*per curiam*," being simply "The judgment of the Supreme Court is unanimously affirmed for the reasons given by the Court." 36 Atl. Rep., 1129.

In National Exchange Bank vs. Gay, 57 Conn., 224; 17 Atl. Rep. 555, referred to above, there was involved a continuing contract of guaranty, which had been given to a national bank in 1872, at which time, as heretofore noted, there was no statute authorizing the extension of the term of a national bank's existence. Thereafter, however, the statute was passed and the particular national bank in question did procure an extension of its term of life, and the question arose as to whether or not this contract of guaranty continued as to paper executed subsequent to the extension of the term. The Supreme Court of Connecticut held that it did, and in speaking of the effect of this extension said:

"The power which created the plaintiff put a limit to its "existence. Before that limit had been reached, while the "plaintiff was in full corporate life, the creating power moved "that limit further into the future. The power which can "create, can prolong. *It was not the substitution of one legal "entity for another; it was not the change of a State into a "National corporation; it was not even the restorationof a spent "corporate life. The identical corporation which received the "breath of life in 1863 has been in uninterrupted, unchanged "existence to this present, having the same rights, bearing the "same obligations.*"

So in the case of People vs. Backus, 117 N. Y., 196; 22 N. E. Rep., 759, the Court of Appeals of New York had occasion to consider the effect of the extension of a national bank charter upon a guaranty which had been given by certain parties to the State, guaranteeing the payment of the State's money deposited in the bank; and the Court held that the guaranty continued after the termination of the time fixed in the original charter, as well as before, and, on that subject, said:

> "Here a new corporation was not formed, but there was a "mere prolongation of the existence of the same corporation, "whose corporate identity was not changed or lost. The bank "which defaulted was the same bank for which the defendants "became bound. *They were not two banks in succession, but all "the time one bank.*"

So far as we know, this Court has never passed on the question now under discussion, but it has twice construed section 5154 of the Revised Statutes, which provides that "any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a National association under this title by the name prescribed in its organization certificate"; and in each case has held that the National bank is the same corporation as the State bank out of which it has grown.

In Michigan Insurance Bank vs. Eldred, 143 U. S., 293, a State bank called the Michigan Insurance Bank was converted into a National bank by the name of the National Insurance Bank of Detroit. Subsequent to this conversion it brought a suit on an obligation incurred to it while it was a State bank, and brought the suit uuder its old State bank name. The defendant pleaded *nul tiel corporation*, and introduced in evidence the papers showing the conversion into a National bank. But, on this subject this Court said:

> "The evidence offered by the defendant on this point "wholly failed to support this defense, and at most only "proved that the plaintiff sued by the wrong name. It "showed no more than that the plaintiff corporation, having "been originally created by the laws of Michigan had, in "accordance with the National Banking act, become a "National bank, and its name been changed accordingly "*without affecting its identity* or its right to sue upon obliga- "tions or liabilities incurred to it by its former name."

A similar ruling had previously been made in the case of Metropolitan Bank vs. Claggett, 141 U. S., 520, where this Court, on a motion to dismiss or affirm, affirmed, as too manifestly correct to need argument, the decision of the Court of Appeals of New York to the effect that the change from a State bank to a

National bank did not "destroy its identity or its corporate existence, but simply resulted in a continuation of the same body, with the same officers and stockholders, the same property, assets, and banking business, under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly."

The proposition that a State bank when changed into a National bank continues to be the same corporation, is nothing like so clear as the proposition that a National bank whose term of existence has simply been lengthened, is the same corporate existence after the original period of time named in the law has been passed as it was before; for in the latter case there is an express declaration to this effect in the statute, whereas in the former case there is not.

These cases simply enforce by judicial authority that which seems to us to be absolutely plain on the face of the statute itself; and the application of them to the case at bar seems to lead irresistibly to the conclusion maintained by the banks. The State made its contract with the Third National Bank, for example, saying in express terms that contract should last "during the corporate existence of such bank"; and the corporation involved in the present litigation, to use the language of the Supreme Court of Connecticut, "was not the substitution of one legal entity for another. * * * It was not even the restoration of a spent corporate life," or to use the language of the Court of Appeals of New York, the corporation involved in this litigation and that which made the contract with the State "were not two banks in succession, but all the time one bank." The bank now in existence, and which the State is now seeking to tax, regardless of the Hewitt act is, in the language of the act of Congress itself, "in all respects the identical association it was before the extension of its period of succession." And it is, therefore, the identical corporation with which the State contracted to the effect that it should not be taxed otherwise than therein provided, "during the corporate existence of such bank," a contract made by the State when it knew, as we are bound to assume, that under the law as it then existed the corporate existence of this bank would exist certainly for twenty years from its original incorporation with a right of extension for twenty years longer, the corporation during the extended period to be "in all respects the identical association it was before."

We submit, therefore, with great confidence, that the corporate existence of the Third National Bank, with which the State made the contract which the Circuit Court upheld as an irrepealable contract, which, by its own terms, was to continue "*during the corporate existence*" of the bank, has not ceased; and that the bank is, therefore, still entitled to the benefit of that contract.

And the same is true as to the Citizens National Bank. The Legislature did not use the expression during its "present charter life," or any similar expression, but used the words of the act of Congress during its "corporate existence." If the draftsman of the Hewitt act had intended so to word it as to bring the contract within the purview of the act of Congress, he could scarcely have used more apt language to have accomplished his purpose. This is a much stronger case than the extension of a charter life by legislation after the date of the contract, which could not have been within the contemplation of the contracting parties.

It must be assumed that the act of Congress was known to the contracting parties. We know that it was within the knowledge of the banks, and, besides the ordinary presumption that it was known to the Legislature, the use of the words employed in the act of Congress indicates quite clearly that the draftsman of the Hewitt act had his eye on the Federal statute when he used the particular expression referred to.

If we then assume that the parties knew of the act of Congress, they knew that no further legislation was needed, and that it rested entirely with the bank, by complying with the act of Congress, to continue for twenty years from the expiration of the original grant, its corporate existence, and remain the identical corporate entity which made the contract, merely extending "*its period of succession.*"

Again, it is said that the Legislature would not have made such a contract, because it would then rest with National banks to continue indefinitely the period of the contract; but this we submit is unsound, since the act of Congress does not contemplate but one extension, and if every one of the National banks availed themselves of the statutory permission to continue its corporate existence, the period of succession as extended, would still fall short of the expiration of many State bank charters.

We therefore submit, that under proper construction of the act of Congress, the Third National Bank and the Citizens National Bank are the identical corporations which made the contracts with the State of Kentucky, and that as the contract by its terms extends throughout their corporate existence, respectively, it is still in full force.

And we further submit that it is no more than fair to assume that the Legislature of Kentucky used the words employed in the Hewitt act intelligently, and with the purpose of accomplishing what they obviously do accomplish, if given their ordinary grammatical signification.

If we are right in these views, then it results that the judgment of the Circuit Court in the case of the Third National Bank vs. Samuel H. Stone, &c., No. 404, and Citizens National Bank vs. Samuel H. Stone, &c., No. 405, must each be reversed; because in these cases the Circuit Court held that the corporation, being a

national bank, the term of whose charter had been extended, was not entitled to the benefit of the contract under the Hewitt act during its extended term; although the court held that it was entitled to the benefit of such contract during the original term fixed in its original charter.

VII.

Is the General Revenue Law of Kentucky Inconsistent with the National Banking Act in Levying a Tax Upon the Property of the Bank, Instead of Upon the Shares of Stockholders.

The National banks in Louisville, with the exception of the First National Bank, all formally accepted the Hewitt act; and the First National Bank accepted the same tacitly by paying taxes under it. These banks were all willing to be taxed by the State according to the provisions of that act, which operated uniformly upon all the banks in the State; and accordingly they waived their privileges as National banks in this respect and to this extent. But, if for any reason, they, or any of them, are not to be taxed under the Hewitt act, then they object and protest against being taxed under the present Revenue law of November 11, 1892, and rely upon their rights as National banks in resisting that tax.

That these instrumentalities of the Federal Government can not be taxed by the State except as Congress consents thereto, and then only to the extent to which the consent goes, was settled by this Court in the case of McCullough vs. Maryland, 4 Wheaton, 316, 431. And the proposition has never since been doubted.

The provision of the act of Congress relating to the taxation of National banks by the States is contained in section 5219, of the Revised Statutes, which is as follows:

> "Sec. 5219. Nothing herein shall prevent all the shares in "any association from being included in the valuation of the "personal property of the owner or holder of such shares, in "assessing taxes imposed by authority of the State within "which the association is located; but the Legislature of each "State may determine and direct the manner and place of tax- "ing all the shares of National Banking Associations located "within the State, subject only to the two restrictions, that the "taxation shall not be at a greater rate than is assessed upon "other moneyed capital in the hands of individual citizens of "such State, and that the shares of any National Banking "Association owned by non-residents of any State shall be taxed "in the city or town where the bank is located, and not else- "where. Nothing herein shall be construed to exempt the real "property of associations from either State, county, or munici- "pal taxes, to the same extent, according to its value, as other "real property is taxed."

It thus appears (1) that the *real property* of National banks may be taxed by the State; (2) that the *personal property* of

National banks *can not* be taxed by the State; but (3) that the shares of stock in National banks may be taxed as against the owners and holders thereof, provided that the taxation thereon shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, and that the shares of non-residents shall be taxed in the city or town where the bank is located.

That the second proposition above is true (as to the non-taxability of the personal property of a National bank) is apparent from the statute itself; but it has, moreover, been expressly affirmed by this court. (Rosenblatt vs. Johnson, 104 U. S., 462).

We must therefore consider the nature of this tax by the State of Kentucky which the National banks are now resisting. Of course, if it is a tax upon the *shares of stock* in the bank as *against the holders* and owners thereof, it is valid unless there is a discrimination against such capital contrary to the restriction in the section quoted. But if it is a tax upon the *personal property*, whether tangible or intangible, *of the bank*, then it is not valid, although it may be that the tax on the personal property of the bank will raise no more revenue than a tax of similar character on the shares of the stockholders would raise. Of course, there is no pretense that it is a tax on the real property of the bank, as the assessed value of the real property and of all other tangible property of the bank is deducted, under this law, from the total valuation of all the assets before the tax now in dispute is laid.

Is this tax then a tax upon the shares of stock of the stockholders, or is it a tax upon the personal property of the bank?

This being a matter of construction of a State statute, we must look to see if the court of last resort of the State has answered the question suggested. That this court will follow the State court in such construction seems to be put beyond further dispute by the previous adjudications of this court.

In Provident Institution vs. Massachusetts, 6 Wall, 611, the question was as to whether the tax was a tax on the franchise of a corporation or upon its property. If upon the latter, then so much of its property as was invested in United States bonds was non-taxable; but if upon the former, then it made no difference in what the assets of the corporation were invested. The Supreme Court of Massachusetts had held on two occasions that the tax was upon the franchise of the corporation, and not upon its property, and this court held that these decisions "must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation, and not a tax on property as contended by the original defendants" (p. 628).

In the late case of Aberdeen Bank vs. Chehallis County, 166 U. S., 440, one of the questions was as to whether a tax of the State of Washington was a tax on the property of the bank or a tax upon the shares of stock of its stockholders. The Supreme Court of

Washington, reading two sections of the statute together, had construed them to impose a tax upon the shares of stock of the stockholders; and, following that decision, this Court said:

> "The Supreme Court of Washington held in this case that "these two sections are to be read together, and that, so read, "their provisions are not inconsistent with those of the Federal "statute. That the two sections of the State law should be "read together is obviously proper, and, at any rate, *we are "bound by the judgment of the Supreme Court of the State in "the mere matter of the construction of that law*" (p. 444).

We must turn then to the decisions of the Court of Appeals to determine the nature of the tax now involved, and we find it has been distinctly held, in a very elaborate opinion by that Court, to be a tax upon "all the intangible property of the corporation." And we will presently see that this Court has concurred in that view.

In Henderson Bridge Company vs. Commonwealth, 99 Ky., 623, the principal question involved was, as to how to arrive at the value of the so-called "franchise," which was required to be taxed by the statute now in question, and which is the same character of tax now sought to be collected from the banks and trust companies involved in this litigation. The statute provided that the Board of Valuation and Assessment, as a mode of arriving at the value of this franchise, should "fix the value of the capital stock of the corporation, * * * and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated," and that the remainder thus found should be the value of the corporate franchise subject to taxation. Ky. Stats., sec. 4079. This, therefore, involved a consideration and determination of what was intended by the term "capital stock" as used in this statute, because the franchise to be taxed was the value of this capital stock less the assessed value of the tangible property of the corporation. This question received a very careful consideration by the Court of Appeals, and its views thereon were expressed in an elaborate opinion. We ask the indulgence of the Court in quoting quite liberally from that opinion, as it shows so unmistakably the determination of the Court to the effect that this franchise tax is a tax upon *the property of the corporation.* After quoting quite freely from different authorities as to the meaning of the words "stock" and "capital stock," the Court says:

> "Thus we see what a varied meaning this term capital stock "may have. So that it becomes necessary to examine and see "what was the object and meaning of the Legislature when "using this term in the clause before quoted from section 4079 "of our statutes.

"In this examination it becomes important to notice those "clauses of the Constitution in reference to revenue and taxa- "tion, and see what was contemplated and enjoined by that "instrument in reference to taxation.

"Section 172 provides 'that all *property* not exempt from "'taxation by this Constitution shall be assessed at its fair cash "'value, estimated at the price it would bring at a fair voluntary "'sale. . .'

"Section 174 provides 'that all property, whether owned "'by natural persons or by corporations, shall be taxed in pro- "'portion to its value, unless exempted by this Constitution, "'and all corporate property shall pay the same rate of taxa- "'tion paid by individual property. Nothing in this Consti- "'tution shall be construed to prevent the General Assembly "'from providing for taxation, based on income, licenses, or "'franchises.

"Then it is manifest that what the Constitution intended to "be taxed was property, all property. And as to corporations, "not only all tangible property, but that it intended to leave "the Legislature of the State free to tax the franchises of cor- "porations if it so desired.

"That the property of a corporation should be taxed as the "property of an individual, it will be observed that in these "several sections quoted 'capital stock,' 'stock,' and 'shares of "stock,' are not mentioned as being appropriate terms to desig- "nate the subjects of taxation, but it says property, all prop- "erty, so that there might be no confusion as to what that "instrument intended (p. 638). * * *

"We find that the Legislature, in framing the first Revenue "law under this new Constitution declared that all property, "both real and personal, should be assessed for taxation at its "fair cash value; at a fair voluntary sale, etc.

"We find that by section 4020, the Legislature, for the "purposes of taxation of corporations, divided their property "into tangible and intangible, leaving the tangible to be "assessed by the officers of the county where the same was "situated, but that as to the intangible (which term was used as "synonymous with franchises) directed that that should be "valued and taxed as provided in section 4077 (p. 639). * * *

"All this indicating, as clearly as it is possible for language "to indicate, that the object of the Legislature was that the "Board of Valuation and Assessment should then be enabled "to form a correct estimate of the *value of the entire property "of the company or corporation* whose case they were investi- "gating.

"Then follows the clause in section 4079, before quoted, "requiring the board from the statement and from all other "evidence before it, to proceed to fix the value of the capital

" stock (*meaning the entire property*), of the company or corpo-
" ration, and that from the amount thus fixed, that they shall
" deduct the assessed value of the tangible property of the com-
" pany or corporation assessed in the State or in the county
" where situated and that the balance thus found should be the
" value of the corporate franchise subject to taxation as afore-
" said.

" So that the question returns, Did the Legislature mean by
" the expression 'capital stock,' only the amount of money that
" may have been paid in by the stockholders, or did it mean to
" embrace and include by that term the entire property of every
" kind and description, tangible and intangible, embracing not
" only capital stock originally paid, but all property afterwards
" acquired and then owned by the company, as well as any
" surplus undivided profits then on hand and all other assets, as
" well as the franchise?

" In the light of the foregoing provisions of the Constitution,
" and of the act of the Legislature, and of the instructions given
" to the Board of Valuation and Assessment and of the sworn
" statement demanded of the president of the company, on
" which, with other testimony to make this valuation, we are
" constrained to say that by this term capital stock, the Legisla-
" ture meant to include *the entire property, real and personal,*
" *tangible and intangible, all assets on hand, and its franchise as*
" *well*, and that when so embraced and construed and valued as an
" entirety, then to take off the tangible property already assessed,
" and that the net balance will show, and shall be the value of
" the franchise to be taxed under section 4077 " (p. 640, 641).

Thus we see how clearly and emphatically the Court expresses its opinion that this franchise tax is a tax upon the intangible property of the corporation, including its franchise properly so called.

But there is still another portion of the opinion which shows with equal clearness that the tax is upon the property of the corporation, and not upon the shares of the stockholders. If upon the property of the corporation, there would be no reason for deducting the debts of the corporation, because indebtedness is not deducted from the assessed value of property for taxation, according to the laws of Kentucky. But if the tax should be considered a tax on the value of the shares of stock of the corporation, then, manifestly, it would be necessary to deduct the debts of the corporation from the total assets of the corporation, in order to ascertain the value of the shares of stock. But, in speaking upon the question as to whether or not there could be a deduction of indebtedness in arriving at the value of the franchise to be assessed under the law in question, the Court of Appeals, in the case under consideration, said:

"But defendants argue that they should not be taxed on the "debt that it owes. It is not so taxed. Of course a debt can "not be made the subject of taxation, as against the one who "owes it.

"But, on the other hand, neither can an outstanding debt be "deducted from the value of any property in assessing same for "taxation. It can not be done in behalf of an individual; is "never done. And when the Constitution requires that the "property (not stock or capital stock, but property of all cor- "porations) must be taxed in the same manner as the property "of an individual, then it is manifest that neither can a corpo- "ration, in an assessment of its property for taxation, obtain any "credit for any debt that it may owe. This proposition we "think absolutely clear" (p. 642).

It seems to us we might rest with the simple reference to, and quotation from, this opinion of the Court of Appeals as to the nature of the tax now under consideration. But the case just referred to was carried to this Court by writ of error, and the judgment of the State Court was here affirmed. The very first sentence in the opinion of this Court being as follows:

"This was an action brought by the Commonwealth of "Kentucky against the Henderson Bridge Company to recover "the sum of $3,675.91, *taxes levied against that company on an* "*assessment made of its intangible property* by the Kentucky "Board of Valuation and Assessment for the year 1893." (Henderson Bridge Co. vs. Ky., 166 U. S., 150, 152.)

And again, in the same opinion, in the conclusion thereof, the Court said:

"The tax in controversy was nothing more than a *tax on the* "*intangible property of the company* in Kentucky, and was "sustained as such by the Court of Appeals, as consistent with "the provisions of the Constitution of Kentucky in reference to "taxation." (Page 154.)

Again, in the case of Adams Express Company vs. Kentucky, which involved a tax upon the Adams Express Company under the same statute now under consideration, this Court, in speaking of this so-called franchise tax, said:

"But, taking the whole act together, and in view of the "provisions of sections 4078 and 4081, we agree with the Cir- "cuit Court that it is evident that the word 'franchise' was not "employed in a technical sense, and that the legislative inten- "tion is plain that *the entire property, tangible and intangible,*

"*of all foreign and domestic corporations*, and all foreign "and domestic companies possessing no franchise, *should be* "*valued as an entirety, the value of the tangible property be* "*deducted*, and *the value of the intangible property thus* "*ascertained be taxed under these provisions.* . . . And *con-* "*sidered as a property tax, as in our opinion the prescribed* "*exaction must be held to be*, we regard it as in harmony with "the provisions of the Constitution of the Commonwealth of "Kentucky. The property, tangible and intangible, owned by "corporations is subjected to like taxation, and so is the tan- "gible and intangible property of individuals associated together "in companies," etc. (Adams Express Co. vs. Ky., 166 U. S., "171, 180.)

So the opinion of Mr. Justice Brewer in delivering the court's response to a petition for rehearing in the case of Adams Express Company vs. Ohio, in which the Court reviews a number of tax cases then pending before it, including the Henderson Bridge case and the Adams Express Company case from Kentucky, shows clearly that the court treats the tax as *a property tax upon the corporation.* One portion, in particular, of the opinion of Mr. Justice Brewer shows this very clearly, for it practically concedes that if any part of the property embraced in the assessment upon which the tax is based consists in United States bonds or other non-taxable property, it should be deducted from the amount of the assessment; thus clearly showing that the Court treated the tax as a property tax; for if it were a tax upon the shares of stock there would be no right to make any deduction on account of the particular character of property in which any part of the company's assets might be invested, as has been often held by this Court. (Adams Express Co. vs. Ohio, 166 U. S., 185, 222.)

In view of these decisions by the Court of Appeals of Kentucky, and by this court, as to the nature of this tax, it would seem indefensible for us to proceed with an original examination of the statute in question for the purpose of demonstrating the correctness of what the courts mentioned have held. And we think we have a right to assume that it has been settled by these decisions that, in the language of this Court in the Henderson Bridge case, the taxes involved are taxes levied *against the corporation on an assessment made of its intangible property.*

The opinion of the Circuit Court in the cases at bar (First National Bank vs. Stone, 88 Fed. Rep., 409) seems to concede in express terms what we here contend for as to the nature of this tax, but attempts to defend it, as we will presently state. The Court says:

"The question is whether the provision for taxing banks "under the revenue act of November, 1892, is a violation of

" this section" (referring to section 5219 of the Revised Statutes). " The provisions of that act are that all banks shall be taxed " upon their real property *and personal property*, and also taxed " upon their *franchises*, to be assessed by subtracting the value " of the tangible property from the value of the capital stock " of the company." (Our Italics.)

The Court then says that it is argued that the State has no right to tax the *franchises* conferred by the government of the United States; though if the Court means by this to state that our argument was limited to this proposition, it is in error, for we not only argued that the State had no right to tax the franchise, but also that it had no right to tax the personal property of the bank. The Court then proceeds:

" But it has been decided in the cases of Henderson Bridge " Company vs. Ky., 166 U. S., 150, and Adams Express Com- " pany vs. Ky., 166 U. S., 171, that the word 'franchise' in the " revenue act of 1892 was not employed in the technical sense, " and that the legislative intention was plain that the entire " property, tangible and intangible, of all foreign and domestic " corporations and all foreign and domestic companies possess- " ing no franchise should be valued as an entirety, that the value " of the tangible property should be deducted, and that the " value of the intangible property thus ascertained should be " taxed under these provisions. It will be seen, therefore, that " the taxation upon all banks is nothing but a tax upon the " value of its capital stock."

If by the last sentence above quoted the Court means that the tax is simply a tax upon all the assets of the bank, then the proposition is manifestly true. The Court's statement of the effect of the law shows, with absolute clearness, that the tax is a tax *upon the property of the bank.*

The Court then proceeds to state that there is no " discrimination " against National Banks in favor of State Banks. But that is a question which we will consider under the next heading of this brief. We are now considering the simple question as to whether the tax is a tax upon the property of the bank or upon the shares of stock in the hands of the stockholders. On this question the Court, in its opinion, refers to the case of Henderson Bridge Company vs. Kentucky, and to the manner in which the value of the franchise to be taxed was reached in that case; alluding, among other things, to the fact that the bonded debt of the corporation, amounting to $2,000,000, was not deducted, but was considered, in connection with the market value of its capital stock, in arriving at the total assets of the corporation to be taxed, and then says:

"In such a case, of course, the assessment for taxation would "be more than the value of the shares of the capital stock."

The Court then proceeds to say, however, that National Banks are not authorized to create a bonded debt, and that, therefore, the conditions existing in the Henderson Bridge case could not arise in a National Bank case. But, surely, the question of whether the tax imposed by this act is a tax upon the property of the corporation or a tax upon the shares of stock of the stockholders can not be made to depend, in case of each corporation, upon the question of whether or not it has a bonded debt. It can not be that the tax against corporation A, which has a bonded debt, is a tax upon the property of the corporation, while the tax imposed by the same statute upon corporation B, which has no bonded debt, is a tax upon the shares of its stockholders. The same statute, the same section and the same language which impose this tax upon one corporation impose it upon all of them. And the same statute, the same section and the same language which fix the mode of arriving at the value of the thing to be taxed, apply to all of the corporations alike. It seems to us, therefore, it can not be said with candor that this tax is a property tax against the corporation, as applied to one corporation, but a tax upon the shares of stock as against the stockholders in case of another corporation, when all are covered by exactly the same language. Whatever that language means as to one corporation, that same language must mean as to all the other corporations covered by it. In the case of Philadelphia Steamship Co. vs. Pennsylvania, 122 U. S., 342, where it was contended that a certain tax was upon the franchise of the corporation granted to it by the State, this Court, speaking through Mr. Justice Bradley, said: "It certainly could not have been intended as a tax upon the corporation franchise, because by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania."

The Circuit Court, however, upholds this tax because "it is not averred in the bill and it does not appear that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock." In other words, the Court seems to be of the opinion that it makes no difference whether the tax be levied upon the property of the bank or upon the shares of stock in the hands of the stockholders, provided the State collects no more taxes than it could lawfully collect under section 5219 of the Revised Statutes by a tax on the shares of stock. This is certainly not our understanding of the law, and we know of no authority to support such a proposition. It seems to us directly contrary to the statute itself and to all the adjudications of this court, beginning with McCullough vs. Maryland, 4 Wheaton. The Court refers to no authority to support this

proposition except Supervisors vs. Stanley, 105 U. S., 311. But that case has no bearing upon the question, because it was there admitted that the tax in controversy was a tax upon the shares of stock in the bank, and the only question at issue was whether or not the holder of such shares should be allowed to deduct his indebtedness from the value of these shares, as the owners of other moneyed capital were allowed to deduct their indebtedness from the amount of such capital. There was certainly no question involved nor decided as to whether or not a tax *upon the property of the bank* would be upheld, provided no more revenue was raised thereby than might have been raised under section 5219 by a tax upon the shares of stock in the hands of the stockholders. This Court seems to us to have gone quite a long way in construing different State statutes as imposing taxes on the shares of stock in a corporation rather than upon the property of the corporation; but it has certainly never yet held that a tax which has been determined to be a tax upon the property of a National bank can be upheld because no more revenue is thereby raised than might have been raised by a lawful tax upon the shares of stock. To so hold would, as it seems to us, be to disregard the plain terms of the statute and all the previous decisions of this Court.

We confidently submit, therefore, that if the National banks, or any of them, are not to be taxed under the Hewitt act, then plainly they can not be taxed under the present revenue law of Kentucky of November 11, 1892, because the latter is plainly a tax upon the property of the bank, and not upon the shares of stock of the stockholders.

The Citizens National Bank and the Third National Bank, both of which accepted the Hewitt act, and as to both of which it has been adjudged that this constituted a contract between them and the State, are perfectly willing to be taxed under that act, and have no desire to withdraw from their agreement. And the First National Bank, though it did not accept the Hewitt act, yet it paid under it, and is perfectly willing now to be taxed under it, uniformly with other banks in the city. But all of these banks object and protest against being taxed under the revenue law of November 11, 1892.

VIII.

Does the Principle of Uniformity Guaranteed by the National Banking Act Protect National Banks in the City of Louisville, Which, for Any Reason, Can Not Claim a Contract Under the Hewitt Act?

In the immediately preceding portion of this brief we have discussed the proposition that the act of November 11, 1892, is not valid against National Banks for the reasons that it is a tax upon the property of the bank, and not upon the shares of stock of the stockholders. But, if by any possible process of reasoning, it should be concluded that National banks can be severed out of the midst of all the corporations by which they are surrounded in this act, and the tax, as to them, be construed to be a tax upon their shares of stock, while, as to all other corporations, it is a tax upon the corporation, yet we insist that, even considered as a tax upon the shares of stock, it is invalid, because it disregards one of the "restrictions" imposed by section 5219 of the Revised Statutes, to-wit, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."

While the prohibition here is against "a greater rate" of taxation, yet it is perfectly plain from a consideration of the reason of the law, which has been so often explained by this Court, that what is intended to be here prohibited is the imposition of a greater burden upon such moneyed capital than is imposed upon other moneyed capital in the hands of individuals; and it makes no difference whether this greater burden is imposed by levying a greater rate of taxation upon the same valuation of property, or whether it is imposed by applying the same rate to a greater valuation of property. In other words, the amount of tax to be paid is arrived at by multiplying the assessed value by the rate of taxation, and this burden can be increased by increasing either one of these factors. And, so far as the taxpayer is concerned, it makes no difference which factor is increased. And such we understand to have been the express ruling of this Court in the case of People vs. Weaver, 100 U. S., 539.

Then does the act of November 11, 1892, impose a greater burden of taxation upon the shares of stock in National banks than is imposed upon other moneyed capital in the hands of individuals?

By the Hewitt act, and the acceptance thereof by practically all the banks of the State, including the National banks and including all the four old banks which were chartered prior to the

passage of the general reservation act of 1856, the State had a uniform system of taxation upon banks and banking capital. It was entirely within the power of the State to preserve this status. It voluntarily departed from it, repealed the Hewitt act so far as it had the power to do so, and has attempted to enforce a new system of taxation which has produced all of the trouble out of which the present complex litigation arises. As a result, it was determined by the highest court of the State, in the year 1895, in litigation to which nearly all of the banks of Louisville were either parties or privies, that the acceptance of the Hewitt act by these various institutions constituted contracts between them and the State lasting during the corporate existence of each institution. And, as a result of this, many of the largest financial institutions of the city can only be taxed under the terms of the Hewitt act, which means a tax of *seventy-five cents* on the $100 of par value of their capital stock, and the ordinary rate of State taxation on their surplus above ten per cent, and a tax on the houses in which they do business; while the tax under the present law and according to the current rates, including both State and municipal tax, in Louisville, is about $2.30 on $100 of value.

It cannot be contended that the amount of the capital protected by the Hewitt act is inconsiderable in comparison with the capital invested in National banks. On the contrary, the amended bill in the several cases of the First National Bank, the Citizens National Bank and the Third National Bank expressly states, among other things, that "The principal office of said bank of Kentucky" (one of the protected banks) "is in Louisville, Ky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the National banks, seven in number, doing business in the city of Louisville, is only $3,811,343" (see record in First National Bank vs. Samuel H. Stone, &c., No. 634, p. 291). The amount of the capital invested in the other banks in the city of Louisville, which were held by the Circuit Court to be protected under the Hewitt act, is not stated in the records of these National Bank cases, though, of course, the amounts do appear in the records in the other cases which are now pending before this court, and swell the amount of capital invested in State banks in the city of Louisville and enjoying the protection of the Hewitt act to a sum far exceeding the total amount of capital invested in all of the National Banks in the city put together.

It was held in Mercantile Bank vs. New York, 121 U. S., 138, that "the main purpose of Congress in fixing limits to State taxation on investments in shares of National banks was to render it impossible for the State in levying such a tax to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character."

And this statement was approved by this Court in Palmer vs. McMahon, 133 U. S., 667.

We are not unmindful of the case of Lionberger vs. Rouse, reported in 9 Wall., 468; on the contrary, we rely upon that case as authority, for it will be seen that the decision rested upon two points:

First. The comparatively small proportion which the capital of the two exempted banks bore to the total banking capital.

Second. That the National Banking act simply required that the States should, so far as it was within their power to do so at the time of the adoption of the act, abstain from discriminating in their taxation against National banks, but that it was not bound to exempt them simply because the State had disqualified itself by contract long before the passage of the National Banking act from taxing two of the banks in the State. It was held that if the State, so far as it had the power to do so, treated the National banks with the same fairness as it did the other banking capital, it was all that could be expected, but it held with equal distinctness that the State must, so far as it is possible for it to do so, treat all capital similarly invested with the same degree of fairness.

Now, in the case at bar, as we have seen, the State had succeeded in making an arrangement with the banks by which they were all, old and new, National and State, placed upon precisely the same footing. After this object had been accomplished, and after the banks had thus been taxed for a number of years (and of course the State had the power to continue that situation), the State, by its own action, voluntarily has passed laws, which, if any effect is given to them, will result in discriminating in the most unjust manner in favor of the old banks as against the National Banks, the discrimination being so gross and unjust that it will not be possible for the National Banks in the city of Louisville to do business in competition with the old State banks, if this Court should reach the conclusion that the old banks are entitled to their old rate of fifty cents on each share of stock, and the other banks are not, or if it should reach the conclusion that the old banks are entitled to the rate of taxation provided in the Hewitt act, and the other banks are not.

Therefore, we insist that, upon this ground, the National Banks are entitled, under the circumstances of this case, to a footing equally favored with the old banks.

Upon this question the Court of Appeals, in the Bank Tax cases, decided in 1895, *supra*, in its opinion by Judge Pryor, said:

> "The case of Lionberger vs. Rouse, 9 Wall, 468, has no "bearing on this question of contract. Here the State was not "powerless to remedy the evil, or prevent the discrimination "complained of in the Missouri case. The Legislature devised a "mode by which this discrimination could be removed, however

"great, or even insignificant, the difference in taxation might "have been. The National Banks, recognizing the fact they "could be taxed as other moneyed capital, and desiring uni- "formity of taxation, and not one rate for one bank and a dif- "ferent rate for another, surrendered their right, or claim, to "be taxed as the old banks were taxed, and entered into this "agreement by which a uniform system of taxation was adopted "for all banks, such as the State desired.

"The claim of the old banks and the National banks, as to "the mode of taxing them, was, certainly, not without founda- "tion, for the reasons already given, and the proposition by the "Legislature to settle these differences, and its acceptance, was "a wise and just solution of the whole question.

"The case presented by the legislative repeal is the opposite "of the legislation in the Missouri bank cases. In the one "case there was no legislation making the discrimination, while "in the case before us the State, after placing the banks, State "and National, on the same footing as to taxation, by the con- "sent and agreement of all the parties to the contract, is now "insisting upon a legislative rescission of the contract, and "placing the old banks at least in a position where they are to "pay only fifty cents on the shares of a hundred dollars, and "leaving the National banks subject to a greater rate of taxa- "tion.

"This repeal, if sustained, is in effect the creation of three "or more new banks with a rate of taxation much less than "that imposed on the National Banks, and making a discrimi- "nation in favor of the old banks and their branches that gives "them a monopoly of the banking business of the State."

In conclusion, therefore, we submit that, even if this tax should be treated as a tax on the shares of stock in the hands of the stockholders of National Banks, it is invalid, because it fails to observe the restriction in the act of Congress forbidding discrimination against such moneyed capital.

If the foregoing views expressed in this (8th) division of this brief be correct, then it follows that the present revenue law of November 11, 1892, in so far as it seeks to tax National banks, is invalid. And the same result necessarily follows, if our views expressed in the next preceding (7th) division of our brief be correct.

If these views be correct, it will necessarily follow that the judgment of the Circuit Court in the cases of First National Bank vs. City of Louisville, No. 635, and First National Bank vs. Stone and others, No. 634, in which the Court refused to enjoin the tax on the First National Bank under the act of November 11, 1892, must be reversed, with instructions to grant such injunction.

And it also follows that the judgments of the Circuit Court in the cases of Citizens National Bank vs. Stone, No. 405, and Third National Bank vs. Stone, &c., No. 404, in which the court refused to grant injunctions against the assessment or collection of taxes under the act of November 11th, 1892, for any years subsequent to 1894, must also be reversed, with instructions to grant such injunctions.

And it further follows that the judgments of the Circuit Court in the cases of the City of Louisville vs. Citizens National Bank, No. 365, and City of Louisville vs. Third National Bank, No. 364, must be affirmed, in which the court enjoined the collection of taxes against those banks under the act of November 11th, 1892, for the years 1893 and 1894; for, although the judgment of the court in those cases was based upon the idea that those banks had accepted the Hewitt act, and were protected by it from taxation under the act of November 11th, 1892, for the years named; yet even independent of the acceptance of the Hewitt act, if the attempt to tax those banks under the act of November 11th, 1892, is invalid *for any reason*, the judgments should be affirmed. A proper judgment, though given for an erroneous reason, must be affirmed.

CONCLUSION.

For the foregoing reasons, without attempting to recapitulate, we submit that the judgments of the Circuit Court in the first six cases enumerated in the caption to this brief should be affirmed; and that the judgments in the last eight cases enumerated should be reversed, with directions as heretofore suggested.

JAMES P. HELM,
HELM BRUCE,
Counsel for Banks and Trust Companies.

January 11, 1899.

APPENDIX.

THE HEWITT ACT.

General Statutes of Kentucky, Ed. 1888, Chap. 92, Art 2.

Section 1. That shares of stock in State and National Banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

Sec. 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of the surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and 20 per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: "I_____, swear (or affirm) that I am the_____ of_____, and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulation of said _____, and how, or in what said surplus, undivided profits, or undivided accumulatious is invested."

Sec. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its

surplus, undivided profits, or undivided accumulations than an amount equal to 10 per cent. of such capital stock, the excess of the amount so invested over the amount equal to 10 per cent. of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

Sec. 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

Sec. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

Sec. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

Sec. 7. If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation, for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

PRESENT REVENUE LAW OF NOVEMBER 11, 1892.

Kentucky Statutes, Secs. 4077–4092, inclusive.

Sec. 4077. FRANCHISE TAXED—BOARD OF VALUATION TO DETERMINE WHERE TAX SHALL BE PAID.—Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company, or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessmeut for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

Sec. 4078. FRANCHISE—REPORTS BY CORPORATIONS TO DERMINE VALUE.—In order to determine the value of the franchise mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer, or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona-fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is

required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

Sec. 4079. FRANCHISE—REPORTS IF LINES EXTEND BEYOND STATE OR COUNTY.—Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized and under the laws of any other State or Government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

Sec. 4080. FOREIGN CORPORATION—VALUE OF FRANCHISE, HOW DETERMINED.—If the corporation, company, or association be organized under the laws of any other State, or government, except as provided in the next section, the Board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amounts of the gross receipts of such corporation, company, or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

Sec. 4081. FRANCHISE OF CARRIER—WHEN TAXED IN EACH DISTRICT THROUGH WHICH LINE PASSES.—If the corporation organized under the laws of this State, or of some other State, or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair-car company, the lines of which extend beyond the limits of this State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the

capital stock, which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State, and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

Sec. 4082. FRANCHISE OF PERSONS ENGAGED IN CERTAIN BUSINESS — HOW VALUE DETERMINED. — Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed, therein, shall be deemed and treated as the capital stock of such person or association of persons, for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

Sec. 4083. NOTICE TO CORPORATIONS OF VALUE OF FRANCHISE— BOARD MAY CHANGE.—It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the chairman of the Board is hereby authorized to summon and swear witnesses, and after hearing such evidence the Board may change the valuation as it may deem proper, and the action of the Board shall be final.

Sec. 4084. VALUE OF FRANCHISE TO BE REPORTED TO COUNTIES ENTITLED TO TAX.—The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the County Clerk of the counties when any portion of the corporate franchise of any such corporation, company, or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

Sec. 4085. PROPERTY ASSESSED IN NAME OF CORPORATION— PENALTY FOR FAILURE TO REPORT—STOCKHOLDERS, WHEN EXEMPT.—The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.

Sec 4086. CORPORATIONS TO PAY TAXES AS INDIVIDUALS.—All corporations and other persons who are required to make reports to the Auditor of Public Accounts, shall pay all the taxes due the State from

them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

Sec. 4087. PENALTY FOR FAILURE OF CORPORATION TO MAKE REPORT.—Any corporation or officer thereof, willfully failing or refusing to make reports, as required by this chapter, shall be deemed guilty of a misdemeanor, and for each offense shall be fined $1,000, and $50 for each day the same is not made after October first of each year.

Sec. 4088. STOCKHOLDERS EXEMPT FROM TAX ON STOCK WHEN CORPORATION PAYS. The individual stockholders of the corp ration which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchises as herein provided.

Sec. 4089. RECEIVER OF CORPORATION TO REPORT. Should any corporation required to make the report as hereinbefore provided be in the hands of, or under the control of, a receiver or other persons, it shall be the duty of such receiver or other person to make the returns and valuations as hereinbefore required.

Sec. 4090. CORPORATION FAILING TO REPORT, BOARD SHALL FIX VALUE. Should any corporation fail to make the reports as required herein on or before the first day of October each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

Sec. 4091. TAXES, EXCEPT OF BANKS AND TRUST COMPANIES, WHEN DUE—PENALTY. All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

Sec. 4092. BANKS AND TRUST COMPANIES—WHEN TO REPORT—TAXES—WHEN DUE—PENALTY.—All banks and trust companies shall file the reports herein required by section four thousand and seventy-eight of this article, on or before the first day of March, one thousand eight hundred and ninety-three, and annually on or before March first thereafter. Said reports shall be made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports, or to pay said taxes as herein required, said banks and trust companies shall be subject to the same fines and penalties as prescribed in section four thousand and ninety-one of this article.

INDEX.

PAGE.

General statement of nature and result of litigation 3

Statement of facts 5

Statement of questions to be determined 17

Did the United States Circuit Court have jurisdiction? 18

Was there jurisdiction in equity? 19

Is the question at issue *res adjudicata?* 26

Does the previous adjudication protect only those institutions which were parties of record in that litigation, or does it protect also those which agreed with the opposing litigant to abide the result thereof? 37

Have the trust companies an equal right with the banks to avail themselves of the plea of *res adjudicata?* 48

Does a contract made between the State and a *National Bank*, which is to continue during the "corporate existence" of the latter, continue in force after the extension of the bank's term of existence under the act of Congress of July 12, 1882? 60

Is the present revenue law of Kentucky, as applied to National Banks, a tax on the *property of the bank*, instead of upon the shares of the stockholders, and for that reason invalid? 68

Does the principle of uniformity or equality, guaranteed by the National Banking Act, protect National Banks in Louisville which for any reason may not be taxed under the "Hewitt Act" of May, 1886? 78

Appendix:

Hewitt Act 83

Present Revenue Law 85

No. 360 vs.

Reply Brf. of Kelm & Bruce for Bank vs.

FEB 17 1899
JAMES H. McKENNEY
Clerk

Filed Feb. 17, 1899.

Supreme Court of the United States.

360 vs.

Samuel M. Stone, Etc., - - - - - - Appellant,

versus

Louisville Banking Company, Etc., - Appellee.

BANK TAX CASES.

JAMES P. KELM,
KELM BRUCE,
Counsel.

C. G. HERNANDEZ PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

SAMUEL H. STONE, ETC., ... *Appellants*,

vs.

LOUISVILLE BANKING COMPANY, ETC., . . *Appellees.*

BANK TAX CASES.

We ask the indulgence of the Court to respond briefly to some of the points made by counsel for the city.

I.

He maintains that the Court has no jurisdiction to entertain these cases because in another case it found that as an original proposition there was no contract between the State and the banks and trust companies, that having so found as an original proposition in another case the only question which the Circuit Court had to decide in these cases was the effect of the former judgment as evidence. In support of this contention he cites the case of Phoenix Fire & Marine Ins. Co., vs. Tennessee, 161 U. S., 183. But the facts stated in that opinion clearly distinguish it from the case at bar. In

the case cited a former judgment affecting the years named was pleaded at bar; the suit was in the State Court. That Court held (1) that there was in fact no contract irrepealable in its nature, and (2) it refused to receive the former judgment as conclusive evidence of the existence of the contract beyond the particular years involved. This Court having held with the State Court on the first proposition, it held upon the second that no federal question was presented. In the case at bar the Circuit Court held that there was the contract claimed, which was conclusively established by the former adjudication. Therefore, so far as these cases are concerned, it was held that there was an irrepealable contract, and that the enforcement of the statute would impair its obligation.

The other cases cited by counsel upon this point bear no more directly upon it than the one last mentioned.

II.

Counsel also makes the point that there is no federal question involved because the statute complained of was adopted prior to and not subsequent to the decision of the Court of Appeals on June 1, 1895. We submit with deference that a little confusion has crept into the mind of the learned counsel. He seems to consider the judgment of the Court as the contract, and therefore assumes that there must be subsequent legislation. But while we have sometimes heard disappointed lawyers in trying to explain "why they lost their case" speak of a decision as "judicial legislation" we do not now remember to have heard the contention so seriously urged before. The decision is not the contract, but the judicial fixing of the rights of the parties under a pre-existing contract.

III.

Counsel urges the objection that these suits are against the State and come within the prohibition of the eleventh amendment to the Federal Constitution.

This question has been so often and so recently before this Court and has been so fully considered that it can not be necessary to do more than to refer to some of the cases which we think conclusively settle the proposition against the contention of the learned counsel. See Pennoyer vs. McConnaughy, 140 U. S. 1; *In Re* Tyler, 149 U. S. 190; Regan vs. Farmers' Loan & Trust Co. 154 U. S. 388; Belknap vs. Schild 161 U. S. 18; Scott vs. Donald, 165 U. S. 112; Tindell vs. Wesley, 167 U. S. 219; Smythe vs. Ames, 169 U. S. 519.

In the Regan case this Court, through Mr. Justice Brewer, commented upon the fact that the State had no pecuniary interest involved.

In the cases at bar the Court will not lose sight of the fact that the real controversy is between the banks and trust companies on the one side and the city of Louisville on the other. The State will get very much more revenue if the banks and trust companies succeed in their contention than if they fail.

On the other phase of the question it may be said that if we are right in our contention that the statute sought to be enforced by the State officers is, as against our clients, unconstitutional, then we come clearly within the reasoning of the cases cited, *supra*. If we are not right in our contention that we have a contract adjudged to be inviolate, the obligation of which is impaired by the enforcement of the statute of November 11th, 1892, then in the language of Bret Harte we can say "subsequent proceedings interest us no more."

IV.

Counsel makes the point that in some of the bills it is not shown that the amount in controversy exceeds $2,000, though he quotes from the bill criticised, this language: "As applied to your orator the tax under the act of November 11, 1892, before referred to, will exceed the tax which it would have to pay under the Hewitt bill by $20,000." Again, "Your orator shows that the State taxes, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and costs, and the taxes claimed by the city of Louisville, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and costs." He attempts to support this contention upon the theory that a proper construction of the pleading would make it mean no more than if the allegation had been that the amount stated would be involved if the whole corporate existence of the complainant should be considered.

It seems to us hardly necessary to respond to this point. Each of the bills shows the years in controversy, and seeks to enjoin in one class of cases, the collection of taxes for the named years, and in the other class of cases, the assessment and certification for the years named. Therefore, the construction of the pleading contended for is not in the least admissible. The language stating the amount in controversy must of necessity be referred to the particular years involved. And it is an inexcusable construction to claim that it may be referred to the whole corporate existence of the complainant. Counsel, however, cites in support of this construction the case of Citizens' Bank vs. Cannon, 164 U. S., 319, which is authority directly against his position, for it is there stated that the pleading, in stating the amount involved, should be construed as referring to the particular years in controversy, which, of course, is the only natural and proper construction.

V.

Counsel further criticises some of the bills because they do not allege in set terms that the State Courts (which rendered the former judgments relied on in the plea of *res adjudicata*) had jurisdiction of the parties or of the subject-matter. But it must be admitted that facts are alleged which show jurisdiction in both respects.

It is further stated that the bills are defective in not alleging that the judgments are in full force and effect and have not been superseded or annulled, but it is alleged that the judgments in the lower Court were entered in pursuance (i. e. in conformity) to the mandate of the Court of Appeals, and it is of course erroneous to state that any appeal would lie from a judgment pursuant to the final mandate in the case, or that the lower Court would have any right to refuse to enter a judgment confessedly pursuant to the mandate. There must be an end to litigation, and when that litigation is ended by the mandate of the Court of last resort, it may not be continued in the manner suggested by counsel.

Aside from these considerations, the lower Court did take jurisdiction and rendered judgment. Appeals were prosecuted. The Court of Appeals took jurisdiction and rendered its judgments upon which mandates issued. Final judgments were entered thereon and pursuant thereto. Copies of the records are exhibited from which it will be seen that no objection to jurisdiction was at any time suggested.

Both of these State Courts are Courts of general jurisdiction, therefore, we maintain that the presumption is in favor of jurisdiction, and no averment of jurisdiction was necessary. (Brown on Jurisdiction, Sec. 20*a*, and the authorities there cited.)

Again, if the judgments are not in full force, that is a matter of defense.

VI.

Counsel in several places in his brief states, or at least broadly intimates, that the stipulation filed with the bills was not executed until after the decision of the Court of Appeals on June 1, 1895. We confess to a feeling of surprise and disappointment upon reading these portions of counsel's brief. There were four persons who signed that paper: H. S. Barker, then counsel for the city and the Sinking Fund Commissioners of the city, now one of the presiding judges of the Jefferson Circuit Court; C. H. Gibson, President of the Board of Sinking Fund Commissioners, A. P. Humphrey and James P. Helm.

We put on the stand Judge Barker because he represented the other side (and even learned counsel, his successor in office, concedes that he is far above reproach). He testified that the stipulation was signed immediately after the second payment by the banks and trust companies to the Sinking Fund, which was in December, 1894. (Bank of Commerce, Rec. p. 46.) Again on cross-examination this question was asked him by counsel for the city.

Q. "I will ask you to state, if you can state now positively, if this original agreement, which you did sign was executed before the decision of the Court of Appeals by Judge Pryor, June 1, 1895." To which he answered: "Most assuredly it was, and before Mr. Tyler died." (Same record p. 50.)

Learned counsel knowing the delicacy which counsel feel in volunteering to testify in cases in which they are engaged, abstained from asking either of them to testify, and also abstained from putting Mr. Gibson, the President of the

Board, on the stand, and apparently prefers, by mere suggestion, unsupported by the record, to cast a doubt upon the good faith of the transaction.

The statement of counsel on page 64 of his brief that the Mayor had not authorized "any agreement whatever on the subject matter embodied in said alleged stipulation" is expressly contradicted by the only witness who testified on the subject. (See Judge Barker's deposition—Bank of Commerce, Rec., p. 45.) He there states that he had many conferences with the Mayor and with the Finance Committee of the General Council, and also that this stipulation between the city and the banks and trust companies was the subject of many earnest conferences between himself, the Mayor and the other officers of the City of Louisville. And he further says that the Mayor and Finance Committee of the General Counsel concurred "most fully" in the propriety of entering into the agreement.

The agreement here referred to was the agreement signed by Barker. This is clearly shown on page 49 of the same record, where he says that the Mayor could not be present, and told him (Barker) to sign it. That this agreement was fully carried out by the banks and trust companies is admitted; that it was done by them on the faith of this agreement goes without saying. It clearly appears from Judge Barker's testimony that, but for the agreement, every bank and trust company would have sued, and in that event, the city would not have received one cent of the large amount paid in on the faith of the agreement. (Bank of Commerce, Rec. 44–5.)

So far as we understand counsel's brief, other points made by him are anticipated and fully answered in our original brief.

JAMES P. HELM,
HELM BRUCE,
Counsel.

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Smythe vs. Ames, 169 U. S., 519.
Citizens' Bank vs. Cannon, 164 U. S., 319.
Brown on Jurisdiction, Sec. 20 *a*.